TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 213.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT L. PORTER, MELVIN L. BOWLIN, AND CHESTER G. HADLEY, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PORTER, BOWLIN & HADLEY.

IN ERROR TO DIVISION NUMBER TWO OF THE APPELLATE COURT OF THE STATE OF INDIANA.

FILED JANUARY 28, 1907.

(20,549.)

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1 STATE OF INDIANA:

In the Appellate Court.

Be it remembered, That heretofore, to-wit: On the 17th day of November, 1903, the same being the 152nd Judicial Day of the May Term 1903 of said Court, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, by Leonard J. Hackney, its counsel, filed in the office of the Clerk of the Appellate Court of Indiana, a transcript of the record and proceedings of the Marion Circuit Court of said State, in a cause wherein Robert L. Porter, *et al.*, were Plaintiffs, and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company was defendant, together with an Assignment of Errors endorsed thereon, which transcript was a Term Appeal, and which said transcript and assignment of errors are in the words and figures following, to-wit:

2 *Index of Record.*

Filing transcript on change of venue.....
Filing original complaint.....
Filing amended complaint.....
First paragraph of amended complaint.....
Second paragraph of amended complaint.....
Default of Thomas, Robert and Lillian Kersey.....
Affidavit for change of venue.....
Granting change of venue.....
Filing motion to consolidate causes of action.....
Motion to consolidate causes of action.....
Overruling motion to consolidate causes of action.....
Demurrer to amended complaint.....
Demurrer to amended complaint overruled.....
Answer .....
Demurrer to second and third answers to amended comp't...
Demurrer to 4, 5, 6 and 7th paragraphs of answer to second paragraph of amended complaint.....
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Rulings on demurrers to answer.....
Reply .....
Request for special finding.....
Default of Thomas, Robert and Lillian Kersey.....
Filing of special findings and conclusions of law.....
Special finding .....
Conclusion of law .....
Decree .....
Filing motion for new trial.....
Motion for new trial.....

Motion for new trial overruled.....
3 Filing motion to modify judgment.....
Motion to modify judgment.....
Overruling motion to modify judgment.....
Prayer for appeal.....
Filing transcript of evidence.....
Filing bill of exceptions.....
Bill of exceptions.....
Index to bill of exceptions.....
Direct examination of R. W. Roberts.....
Cross-examination of R. W. Roberts.....
Direct examination of John L. Wade.....
Complaint in Porter *et al. v.* John T. Walton in Cause No. 199 .....
Summons " " "
2nd Summons " " "
Certificate of sale " "
Decree of Foreclosure " "
Notice of sale " "
Complaint in Porter *et al. v.* John T. Walton in Cause No. 198 .....
Summons " " "
Certificate of sale " "
Decree " "
Notice of sale " "
Complaint in Porter *et al. v.* Kelley *et al.* in Cause No. 197.
Summons " " "
Certificate of sale " "
Decree of Foreclosure " "
Notice of sale " "
Return of decree " "
Sheriff's deed " "
4 Sheriff's deed in Porter *et al. v.* John T. Walton....
Direct examination of C. W. Cochrane.....
Cross-examination of C. W. Cochrane.....
Re-examination .....
Direct examination of John L. Wade—recalled.....
Decree of foreclosure in Porter *et al. v.* Walton Cause No. 198.
Decree of foreclosure in Porter *et al. v.* Walton Cause No. 199.
Cross-examination of John L. Wade.....
Plaintiff rests .....
Defendant's exhibit's exhibit No. 4.....
Direct examination of Hadley Baldwin.....
Conclusion of evidence.....
Certificate of official report.....
Filing transcript of evidence .....
Signing and filing of bill of exceptions.....
Filing appeal bond.....
Praecipe .....
Certificate of transcript .....

5 Nov. 6th, 1903.—Costs of Trans. $23.75.
Paid by def't. WM. E. DAVIS, *Clerk.*

Be it remembered, That among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered etc., in the Circuit Court of the County of Marion, State of Indiana are the following in the cause of

No. 10583.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Be it also remembered, That heretofore, to-wit: on the 11th day of October, 1900, there was filed in the office of the said Marion Circuit Court, a transcript from the records of the Circuit Court of Boone County, Indiana, in these words and figures, viz:

Transcript of Change of Venue.

6 *Filing Original Complaint.*

Pleas and proceedings had in the Boone Circuit Court at a regular term, begun, held and continued in the Court House in the City of Lebanon, on the first Monday in April, 1898, before the Honorable Barton S. Higgins, sole Judge of said Court in the case of—

No. 686.

ROBERT L. PORTER ET AL.
vs.
C. C. C. & ST. L. R'Y CO.

To Foreclose Street Assessment.

Transcript on change of venue.

Be it remembered that on the 26th day of May, 1898, the above named plaintiffs by their attorney, S. R. Artman filed in the office of the Clerk of the Boone Circuit Court, their complaint to foreclose street assessment against the above named defendant.

Amended complaint filed September 5, 1900.

Original Complaint omitted.

And afterwards, towit: on the 5th day of September, 1900, the same being the 3rd judicial day of the September term of said court the following proceedings were had before the same Hon. Judge towit:

Filing Amended Complaint.

No. 686.

ROBERT L. PORTER ET AL.
vs.
C. C. C. & St. L. RY. CO.

To Foreclose Street Assessment.

Come now the plaintiffs by attorney and file an amended complaint herein, making new parties defendant, which complaint reads as follows, towit:

7 STATE OF INDIANA, *County of Boone, ss:*

In the Boone Circuit Court, April Term, 1900.

ROBERT L. PORTER, CHESTER G. HADLEY, MELVIN L. BOWLIN, Plaintiffs,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO and ST. LOUIS RAILWAY COMPANY, THOMAS A. KERSEY, Defendants.

Amended Complaint.

The above named plaintiffs complain of the above named defendants and for a first paragraph of amended complaint say, that the defendant the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, is a railroad corporation organized and operated under and pursuant to the laws of the State of Indiana and the State of Ohio.

That said defendant is the owner of a line of railway, railroad right of way and several tracts of real estate situate in the corporate limits of the City of Lebanon, Indiana. That the City of Lebanon in Boone County in the State of Indiana, is a municipal corporation; that the Common Council of the said City of Lebanon, Indiana, by a two thirds vote of all its members on the 27th day of January, 1896, adopted a declaratory resolution for the improvement of West Main Street in said City from the west corporation line to the west side of Lebanon street, providing for grading and paving the same and constructing sidewalks and lawns, and that said Common Council in said declaratory resolution fixed the 24th day of February, 1896, and the Council Chamber of said City as the time and place when and where persons interested in said proposed improvement might appear before said Common Council and object to the improvement of said street; that said Common Council in said
8 resolution directed the Clerk of said City to give ten days' notice by two weeks publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time

and place of hearing such objections; that the Clerk of said City did give ten days' notice by two weeks' publication in the Lebanon Patriot aforesaid of the time and place when and where persons interested in said improvement might appear before said Common Council and object to the making of said improvement; that on the 16th day of April, 1896, the Common Council of said City, by a two thirds vote of all its members, adopted a special ordinance ordering the improvement of West Main Street in said city from the west corporation line to the west side of Lebanon street in the manner provided in the declaratory resolution aforesaid, and fixing in said ordinance the 18th day of May, 1896, as the date for receiving bids for the construction of said improvement, and directing the clerk of said city to give three weeks' notice by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place fixed for receiving such bids; that the clerk of said city did give three weeks' notice by publication in the aforesaid Lebanon Patriot for three weeks of the time and place when and where the Common Council of said city would receive bids were filed for the construction of said improvement; that on the said 18th day of May 1896, six separate bids were filed for the construction of said improvement, that the Common Council of said city rejected all of said bids as being excessive and ordered the clerk of said city to again give three weeks' notice by publication in the aforesaid Lebanon Patriot that said Common Council would receive bids for the construction of said improvement on the 24th day of June, 1896, the city clerk of said city did give notice by three
9 weeks' publication in the aforesaid Lebanon Patriot that the Common Council of said city would receive bids for the construction of said improvement on the 24th day of June, 1896; that upon the said 24th day of June, 1896, five separate bids for the construction of said improvement were filed before said Common Council; that the plaintiffs herein as partners in the style and firm name of Porter, Bowlin and Hadley filed before said Common Council a bid for the construction of said improvement; that after mature consideration the Common Council of said city accepted the bid of the plaintiffs herein for the improvement of said street and awarded them the contract therefor; and upon the 24th day of June, 1896, the plaintiffs herein entered into a formal contract with said city for the improvement of said street and gave bond for the faithful discharge of said contract as provided by law; that pursuant to the terms of said contract the plaintiffs entered upon the construction of said improvement and fully completed the same in accordance with said contract and the specifications therefor, prior to the 14th day of December, 1896; that on the 14th day of December, 1896, the Common Council of said city accepted said improvement as fully completed according to the contract and specifications therefor, and made an order directing the City Civil Engineer of said city to prepare and file an estimate of the cost and expenses of said improvement as provided by law; that on the said 14th day of December, 1896, the City Civil Engineer of said city filed before said Common Council his estimate of the cost and expenses of construct-

ing said improvement, which estimate was on said date referred by said Common Council to its Committee on Streets and Alleys, which Committee was then and there appointed for that purpose, and said Common Council fixed the 4th day of January, 1897, and the
10 Council Chamber of said City as the time and place for the meeting of said Committee to consider said report and directed the City Clerk to give two weeks' notice of the time and place of the meeting of such committee by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, and the City Clerk did give such notice as directed by said Common Council; that said committee on Streets and Alleys made report to said Common Council on the 14th day of January, 1897, recommending that the estimate of the costs of said improvement be amended and modified as shown in corrected estimate filed with said report and recommending that the several amounts set out in said report be assessed against the several lots and parcels of ground respectively abutting on said street as therein set out and described, a copy of which corrected and amended estimate report is filed herewith, made a part hereof and marked Exhibit "A."

That said Common Council on the 14th day of January 1897, by a two thirds vote of all its members adopted the report of said Committee on Streets and Alleys, and assessed against the lots and parcels of land respectively abutting on said street as described in said corrected estimate report, the several amounts as therein set out; that one Mary Kelley was at that time the owner of the following described unplatted land lying within the corporate limits of the said city of Lebanon, Indiana, and abutting upon the street improved, towit: Commencing in the center of the Crawfordsville road 380 feet east of the west line of the southwest quarter of section 36, in township 19 north, range one west, thence east 230 feet to the right of way of the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., thence northwest with said right of way and on the south side thereof 254 feet and five inches, thence south 113 feet to the place of beginning.

11 That said above described real estate was assessed by the Common Council of the City of Lebanon, Indiana, for the improvement of said street the sum of $588.56 on the 14th day of January, 1897. That the said Mary Kelley for more than twenty days after the making of said assessment wholly failed and refused to pay said assessment and did not within two weeks after the making of said assessment make application in writing as provided by law for the privilege of paying said assessment in ten annual installments. That on the 4th day of March, 1897, said assessment was past due and wholly unpaid, and on said date these plaintiffs, filed in the circuit court of Boone county, Indiana, their complaint against the said Mary Kelley, and Patrick Kelley, her husband, to foreclose the lien of said assessment against said real estate.

That summons was issued and served upon the said defendants Mary Kelley and Patrick Kelley, in the proceedings as provided by law and such proceedings were had therein, that on the 16th day of March, 1897, the Boone Circuit Court rendered judgment against

said defendants foreclosing the lien of said assessment as against said real estate for the amount of said assessment and eight dollars and fifty-seven cents interest accrued to that date and sixty-five dollars attorney's fees, making a total of six hundred and fifty-two dollars and thirteen cents. That the costs in said proceeding including costs of sale amounted to twenty-five dollars and eighty-five cents. That said real estate was properly advertised for sale by the sheriff of Boone County, Indiana, and sold on the 24th day of April, 1897, as required by law at public outcry at the court house door in the said city of Lebanon, to one Smith F. Cox for the sum of seventy-five dollars, which was the fair cash value of said real estate at said time. That four dollars and nineteen cents interest had ac-
12 crued on said judgment from the date of its rendition to the date of sale, making the total amount then due, not including costs, the sum of six hundred fifty-six dollars and thirty-two cents. That there is now due and owing to the plaintiffs this amount less the sum of seventy-five dollars, the amount for which said real estate was sold, leaving now due and owing to these plaintiffs the sum of five hundred eighty-one dollars and thirty-two cents together with interest thereon at the rate of six per cent. per annum from the twenty-fourth day of April, 1897. That the defendant railway company is now and was at the date of the assessment for the improvement of said street the owner of a parcel of real estate within the corporate limits of said city lying adjacent and contiguous to the real estate herein described as belonging to the said Mary Kelley, and which real estate of the defendant railway company lies immediately back of said real estate of the said Mary Kelley from the street so improved, that is the real estate of the said Mary Kelley is situate immediately between the street so improved and the parcel of real estate owned by the defendant railway company and there is and was at the time of said assessment no other real estate abutting upon the street so improved immediately in front of the parcel of real estate owned by the defendant railway company, which real estate is within one hundred and fifty feet of the line of street so improved and is described as follows, towit: Commencing at the north west corner of the real estate of the said Mary Kelley, thence north sixty-two feet, thence east parallel with said Crawfordsville road 24 2/10 feet to a point 33 feet north of the center of the Cleveland, Cincinnati, Chicago and St. Louis Railway, thence south 63 1.2 degrees east 171 4/10 feet on a line parallel with and 33 feet
13 north of the center of the said railway, thence south 70 3/10 feet to the north side of Main street at its intersection with the south line of the right of way of said railway, thence north 63 1/2 degrees west with the south line of said right of way 198 1/2 feet to the point of beginning.

That the plaintiffs have demanded of the defendant railway company the payment of said balance due on said assessment and the defendant has refused and failed to pay the same or any part thereof but denies its liability therefor. That sixty-five dollars, the attorney fee allowed by the court in the foreclosure of the lien of said assessment against the real estate owned by the said Mary Kelley was a

fair, just and reasonable attorney's fee for said services. That there is now due to the plaintiff on the balance of said assessment the amount hereinbefore alleged which is past due and remains wholly unpaid. That the defendant Thomas A. Kersey claims to be the owner of some part of the real estate hereinbefore described as belonging to the railroad company and is made a party to answer as to his interest therein.

Wherefore the plaintiffs demand judgment against the defendant railway company for the sum of eight hundred dollars for the foreclosure of the lien of said assessment against said defendant's real estate herein described and an order for the sale of the same and that if the said Thomas A. Kersey has any interest therein for a judgment of foreclosure against him and for all other proper relief.

14 STATE OF INDIANA, *County of Boone, ss:*

In the Boone Circuit Court, April Term, 1900.

ROBERT L. PORTER, CHESTER G. HADLEY, MELVIN L. BOWLIN, Plaintiffs,

vs.

THE CLEVELAND, CINCINNATI, CHICAGO, AND ST. LOUIS RAILWAY COMPANY, ROBERT H. KERSEY and LILLIAN KERSEY, Defendants.

The above named plaintiffs complain of the above named defendants and for a second paragraph of amended complaint say, that the defendant the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, is a railroad corporation organized and operating under and pursuant to the laws of the State of Indiana and the State of Ohio; that said defendant is the owner of a line of railway, railroad right of way and several tracts of real estate situate in the corporate limits of the City of Lebanon, Indiana. That the City of Lebanon in Boone County in the State of Indiana, is a municipal corporation; that the Common Council of the said City of Lebanon, Indiana, by a two thirds vote of all its members on the 27th day of January, 1896, adopted a declaratory resolution for the improvement of West Main Street in said city from the west corporation line to the west side of Lebanon street, providing for grading and paving the same and constructing the sidewalks and lawns, and that said Common Council in said declaratory resolution fixed the 24th day of February, 1896, and the Council Chamber of said city as the time and place when and where persons interested in said proposed im-

15 provement might appear before said Common Council and object to the improvement of said street; that said Common Council in said resolution directed the Clerk of said city to give ten days notice by two weeks' publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place of hearing such objections; that the Clerk of said city did give ten days' notice by two weeks' publication in the Lebanon Patriot aforesaid of the time and place when and where persons interested in said improvement might appear before said Common

Council and object to the making of said improvement; that on the 16th day of April, 1896, the Common Council of said city, by a two-thirds vote of all its members, adopted a special ordinance ordering the improvement of West Main Street in said city from the west corporation line to the west side of Lebanon Street in the manner provided in the declaratory resolution aforesaid, and fixing in said ordinance the 18th day of May, 1896, as the date for receiving bids for the construction of said improvement and directing the clerk of said city to give three weeks' notice by publication in the Lebanon Patriot a weekly newspaper printed and published in said city, of the time and place fixed for receiving such bids; that the Clerk of said city did give three weeks' notice by publication in the aforesaid Lebanon Patriot for three weeks of the time and place when and where the Common Council of said city would receive bids for the construction of said improvement. That on the said 18th day of May, 1896, six separate bids were filed for the construction of said improvement, that the Common Council of said city rejected all of said bids as being excessive and ordered the Clerk of said city to again give three weeks' notice by publication in the aforesaid Lebanon Patriot that said Common Council would receive bids for the construction of said improvement on the 24th day of June, 1896, the city clerk
16 of said city did give notice by three weeks' publication in the aforesaid Lebanon Patriot that the Common Council of said city would receive bids for the construction of said improvement on the 24th day of June, 1896; that upon the said 24th day of June, 1896, five separate bids for the construction of said improvement were filed before said Common Council; that the plaintiffs herein as partners in the style and firm name of Porter, Bowlin and Hadley filed before said Common Council a bid for the construction of said improvement; that after mature consideration the Common Council of said city accepted the bid of the plaintiffs herein for the improvement of said street and awarded them the contract therefor; and upon the 24th day of June, 1896, the plaintiffs herein entered into a formal contract with said city for the improvement of said street and gave bond for the faithful discharge of said contract as provided by law; that pursuant to the terms of said contract the plaintiffs entered upon the construction of said improvement and fully completed the same in accordance with said contract and the specifications therefor, prior to the 14th day of December, 1896; that on the 14th day of December, 1896, the Common Council of said city accepted said improvement as fully completed according to the contract and specifications therefor, and made an order directing the City Civil Engineer of said city to prepare and file an estimate of the cost and expenses of said improvement as provided by law; that on the said 14th day of December, 1896, the City Civil Engineer of said City filed before said Common Council his estimate of the cost and expenses of constructing said improvements, which estimate was on said date referred by said Common Council to its Committee on Streets and Alleys, which Committee was then and there appointed

for that purpose, and said Common Council fixed the 4th
17 day of January, 1897, and the Council Chamber of said city as the time and place for the meeting of said Committee to consider said report and directed the City Clerk to give two weeks' notice of the time and place of the meeting of such Committee by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, and the City Clerk did give such notice as directed by said Common Council; that said Committee on Streets and Alleys made report to said Common Council on the 14th day of January, 1897, recommending that the estimate of the costs of said improvement be amended and modified as shown in corrected estimate filed with said report and recommending that the several amounts set out in said report be assessed against the several lots and parcels of ground respectively abutting on said street as therein set out and described, a copy of which corrected and amended estimate report is filed herewith, and made a part hereof and marked Exhibit "A."

That said Common Council on the 14th day of January, 1897, by a two-thirds vote of all its members adopted the report of said Committee on Streets and Alleys and assessed against the lots and parcels of land respectively abutting on said street as described in said corrected estimate report, the several amounts as therein set out; that one John T. Walton was at that time the owner of the following described unplatted land lying within the corporate limits of the said City of Lebanon, Indiana, and abutting on the street improved, towit: Commencing in the center of the Crawfordsville state road 413½ feet west of the east line of the southwest quarter of the north-east quarter of section 36 township 9 north, range one west, thence south 74 feet, thence north 63 1/2 degrees west 161 feet,
thence north 89 degrees east 144 1/2 feet with the center of
18 said Crawfordsville road to the place of beginning, containing 12/100 acres more or less.

That the above described real estate was assessed by the Common Council of the City of Lebanon, Indiana, for the improvement of said street the sum of two hundred seventy-three dollars and seventy-three cents on the 14th day of January, 1897. That the said John T. Walton for more than twenty days after the making of said assessment wholly failed and refused to pay said assessment and did not within two weeks after the making of said assessment make application in writing as provided by law for the privilege of paying said assessment in ten annual installments. That on the 4th day of March, 1898, said assessment was past due and wholly unpaid, and on said date these plaintiffs filed in the Circuit Court of Boone County, Indiana, their complaint against the said John T. Walton, to foreclose the lien of said assessment against said real estate.

That summons was issued and served on the said John T. Walton in said proceedings as provided by law and such proceedings were had therein, that on the 17th of March, 1897, the Boone Circuit Court rendered judgment against said defendant foreclosing the lien of said assessment as against said real estate for the amount of said assessment and four dollars and ten cents interest accrued to that date and thirty five dollars attorney's fees, which was a reasonable

attorney's fee for said services, making a total of three hundred twelve dollars and eighty-eight cents. That the costs of said proceeding including costs of sale amounts to twenty-four dollars and sixty-eight cents. That said real estate was properly advertised for sale by the sheriff of Boone County, Indiana, and by him sold on the 24th day of April, 1897, as required by law at public outcry at the court house door in the said City of Lebanon to one
19 Robert Kersey for the sum of twelve dollars, which was the fair cash value of said real estate at that time.

That one dollar and ninety-two cents interest had accrued on said judgment from the date of its rendition to the date of sale making the total amount then due not including costs the sum of three hundred fourteen dollars and eighty cents; that there is now due and owing to the plaintiffs on said assessment this amount less the sum of twelve dollars, the amount for which said real estate was sold, leaving now due and owing to these plaintiffs on said assessment the sum of three hundred two dollars and eighty cents together with interest thereon at the rate of six per cent. per annum from the 24th day of April, 1897. That the defendant railway company is now and was at the date of the making the assessment for the improvement of said street the owner of a parcel of real estate within the corporate limits of said city lying adjacent and contiguous to the real estate herein described as belonging to the said John T. Walton and, which real estate of said defendant lies immediately back of said real estate of the said John T. Walton from the street so improved, that is the real estate of the said John T. Walton is situated immediately between the street improved and the parcel of real estate owned by the defendant railway company and there is and was at the time of said assessment no other real estate abutting on the street so improved immediately in front of the parcel of real estate owned by the said defendant company, which real estate is within one hundred and fifty feet of the line of the street so improved and is described as follows, towit: Commencing at a point 413½ feet west and 73 feet south of a point where the center line of the Crawfordsville road intersects the east line of the south-west quarter of
20 the north-east quarter of section thirty-six, township nineteen north, range one west, and run south 53 1/2 feet to a point 33 feet south of the center of the C. C. C. & St. L. R'y. right of way; thence north 63 1/2 degrees west on a line parallel with and 33 feet south of the center of said right of way a distance of 105 1/2 feet, thence north 53 1/2 feet to the south side of Main Street; thence south 63 1/2 degrees east 105 1/2 feet to the point of beginning.

That the plaintiffs have demanded of the defendant railway company the payment of said balance due on said assessment, and said defendant has refused and failed to pay the same or any part thereof. That there is now due and owing to the plaintiffs on the balance of said assessment the amount hereinbefore alleged, which is past due and remains wholly unpaid. That the defendant Robert H. Kersey claims an interest in and to said real estate described as belonging to the defendant railway company and is made a party defendant to answer as to his interest therein. That the defendant Lillian Kersey

is the wife of the said Robert H. Kersey and is made a party defendant for that reason.

Wherefore the plaintiffs demand judgment against the defendant railway company for five hundred dollars, for the foreclosure of the lien of said assessment against the said defendant's real estate and an order for the sale of the same and if the said Robert H. Kersey is found to have any interest therein a judgment of foreclosure against him and his said wife Lillian Kersey and for all other proper relief.

SAMUEL R. ARTMAN,
Att'y for Plaintiffs.

21 And the Court orders summons issued for the defendants, Thomas A. Kersey, Robert H. Kersey and Lillian Kersey, returnable Sept. 17th, 1900.

And afterwards, towit: On the 1st day of October, 1900, the same being the 25th Judicial Day of the said September Term of said Court, the following further proceedings were had before the same Honorable Judge towit:

Default of Thomas, Robert, and Lillian Kersey.

Transcript on Change of Venue.

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C. & ST. L. RY. CO. ET AL.

To Foreclose Street Assessment.

Come now the plaintiffs by attorney, and it appearing to the court from the summons issued and the return of the Sheriff endorsed thereon; that the defendants, Thomas A. Kersey, Robert H. Kersey and Lillian Kersey, has been duly served with process more than ten days before the same was returnable, and said defendants are each three times audibly called in open court, but come not and herein wholly make default. And the plaintiffs now file a motion and affidavit for a change of venue from the County, which motion reads as follows, towit:

22 *Motion and Affidavit for Change of Venue.*

STATE OF INDIANA, *County of Boone, ss:*

Boone Circuit Court, August Term, 1900.

No. —.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY.

Comes now Robert L. Porter, one of the plaintiffs in the above entitled cause and moves the court for a change of venue in said cause and assigns for cause for said change, that on account of the bias and prejudice of the citizens of said county against their said cause of action, that they cannot have a fair and impartial trial of said cause.

Wherefore they ask that the venue of said cause be changed to some other county.

ROBERT L. PORTER.

Subscribed and sworn to before me this 6th day of September, 1900.

GLEN J. GIFFORD,
Notary Public.

[SEAL.]

My Commission expires Sept. 19, 1903.

23 *Change Granted.*

And the Court being sufficiently advised in the premises, sustains said motion and hereby orders and directs the Clerk of this court to prepare a transcript of the proceedings had in this cause and transmit the same, together with all papers filed herein, to the Clerk of the Marion Circuit Court of Marion County, Indiana, for trial, within ten days of this date, upon the payment of the costs of change by the plaintiffs herein.

Read and signed in open Court.

BARTON S. HIGGINS, *Judge.*

STATE OF INDIANA, *Boone County, ss:*

I, Oliver P. Worley, Clerk of the Boone Circuit Court, hereby certify that the above and foregoing is a true and complete copy of all the proceedings had in the above entitled cause, and that all the papers on file are herewith transmitted.

In witness whereof I have hereunto set my hand and the seal of the Boone Circuit Court, at Lebanon, this 10th day of October, 1900.

[SEAL.]

OLIVER P. WORLEY,
Clerk Boone Circuit Court.

24 And afterwards, towit: on the 14th day of February, 1901, being the 10th Judicial Day of the said February Term of the Marion Circuit Court, before the Hon. Henry Clay Allen, sole Judge thereof, the following proceedings were had herein, viz:

Filing Motion to Consolidate.

"Come the parties by counsel, and the defendant Railway Company files its motion to consolidate the paragraphs of the amended complaint herein as follows:

25 *Motion to Consolidate.*

ROBERT L. PORTER ET AL.
vs.
THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY ET AL.

Comes now the defendant the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and moves the court to require the plaintiffs to join and consolidate in one paragraph and as one cause of action the facts and causes pleaded in the several paragraphs of amended complaint for the reason that the facts and causes alleged in said several paragraphs of complaint constitute but a single cause of action.

S. M. RALSTON,
L. J. HACKNEY,
Att'y- for Def't.

Ruling on Motion to Consolidate.

And the Court being advised in the premises, overrules said motion, to which ruling of the court said defendant excepts and ten days are given to file Bill of Exceptions; and now said defendant files a demurrer to the amended complaint in these words:

26 *Demurrer to Amended Complaint.*

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY ET AL.

Comes the defendant the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and demurs to the amended complaint herein and as cause of demurrer says there is a misjoinder of causes action therein.

2. For second and further cause of demurrer the defendant The Cleveland, Cincinnati, Chicago and St. Louis Railway Company

says that the first paragraph of the amended complaint does not state facts sufficient to constitute a cause of action against it.

3. For third and further cause of demurrer the defendant, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company says that the second paragraph of the amended complaint does not state facts sufficient to constitute a cause of action.

S. M. RALSTON,
L. J. HACKNEY,
Att'ys for Defendant.

Ruling on Demurrer to Amended Complaint.

Which said demurrer the court overruled and the said defendant excepts to said ruling at the time thereupon said defendant files its answer to said amended complaint as follows:

27 *Answer.*

STATE OF INDIANA, *County of Boone, ss:*

In the Circuit Court.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY ET AL.

The defendant, the Cleveland, Cincinnati, Chicago and Saint Louis Railway Company for answer to the amended complaint herein says that it denies each and every material allegation therein contained.

2. For second and further answer to the amended complaint and to each paragraph thereof separately, the defendant says that its tracts of land severally mentioned and described in the complaint do not front or abut upon the line of the street alleged by the plaintiffs to have been improved; that said tracts and parcels respectively are unplatted, are not subdivided and they lie back and remote from said street, and other lands, not owned before, at the time of, or since said improvement, by this defendant, lie between said tracts respectively of this defendant and the streets so improved; that in the proceedings of the Common Council of the City of Lebanon, in any action taken by the Civil Engineers of said City, in any notice to property owners, in any assessment of property had, given or done with reference to said improvement this defendant's said tracts were not named, described nor referred to nor was either of them; that neither of said tracts were assessed for said improvement, neither of said tracts was considered with reference to any assessment for said improvement, neither of said tracts was benefitted by said improve-

ment; that the defendant did not appear before said Council
28 or any committee of said Council either actually or constructively with reference to either of its said tracts and the records of the proceedings of the City of Lebanon as to said improvemetns do not disclose any such appearance by or notice to this defendant or the consideration or assessment of either of said tracts for such improvement. Defendant also avers that the only claim or pretense of lien in favor of the plaintiffs and against said tracts respectively of this defendant by reason of said improvement exists by estimating the entire cost of said improvement and by arbitrarily dividing such cost by the number of front feet of the street so improved and the properties abutting upon said improvement were arbitrarily charged with the proportion which the front feet of each sustained to the whole line of the improvement and such assessment is now asserted to extend back from such abutting property and include the tracts of the defendant so situated back from the front and remote from said street.

3. For third and further answer to the amended complaint and each of the paragraphs thereof separately the defendant says that the Acts of the General Assembly of the State of Indiana under and by virtue of which it is claimed and assumed that the liens respectively sued upon have accrued and attach to the respective tracts of the defendant is unconstitutional and void in that it makes no provision for a notice to or a hearing from the property owner whose property does not abut upon the street to be improved; it denies due process of law, denies the equal protection of the laws and takes private property for public use without compensation.

4. For fourth and further answer to the first paragraph of the complaint said defendant says that the foreclosure proceeding alleged in said paragraph of complaint did not cover and include all
29 the property within fifty feet back from the property line of said Mary Kelley in its frontage upon the street alleged to have been improved; that within said distance were other lands owned by said Mary Kelley by Thomas A. Kelley and by this defendant and not included within said foreclosure, which said lands preceded in liability, if any, the greater portion of the lands of this defendant described in said paragraph of complaint which lie more than fifty feet from the line of said improvement.

5. The defendant for fifth and further answer to the first paragraph of the plaintiff's amended complaint alleges that within one hundred feet back of the line of the improvement alleged in said paragraph of complaint and within one hundred feet back of the line of the property of Mary Kelly where it abuts upon the street so improved, there are lands owned by —— Miller which should *near*, together with the lands of this defendant within said distance, their proportion of the costs of said improvement and, the defendant alleges, the plaintiffs may not elect which of several property owners within such distance from the improvement they will sue but they must pursue all property within such distance.

6. The defendant for sixth and further answer to the first paragraph of amended complaint, alleges that in the foreclosure pro-

ceedings alleged in said paragraph of complaint the plaintiffs included, proceeded against and sold certain lands back from the line of said street and remote from the improvement more than fifty feet, towit: certain lands of Mary Kelly lying between the lands of this defendant, described in said paragraph of complaint, and the line of said street; that the said lands of the said Mary Kelly were liable, if at all, in connection with the lands of this defendant within the second distance fifty feet back from the line of said im-
30 provement.

7. The defendant for seventh and further answer to the first paragraph of amended complaint says that it admits the proceedings improvement and assessment alleged in said paragraph of complaint and admits the foreclosure of the lien of said assessment as against Mary Kelly and the sale of her property as further alleged by the plaintiffs. The defendant avers, however, that within fifty feet back from the front line of said property of said Mary Kelly where the same abuts upon the street so improved there were other unplatted lands, towit: lands of —— Miller and lands of this defendant. It is further averred that within one hundred feet back from the front line of said property of said Mary Kelly, where the same abuts upon the street so improved there were still other unplatted lands, towit: lands of —— Miller and lands of said Mary Kelly and lands of this defendant. It is also alleged that within one hundred and fifty feet back from the front line of the property of said Mary Kelly where the same abuts upon said street so improved there were still other unplatted lands towit: lands of the defendant and lands of —— Miller. That the plaintiffs, who instituted and prosecuted the said proceedings in foreclosure against said Mary Kelly, elected to proceed against the property alone of the said Mary Kelly and wholly omitted from said proceeding to foreclose said lien the names and property of this defendant and of said —— Miller and obtained judgment against the property only of said Mary Kelly which judgment was, as alleged, satisfied by a sale of the property of said Mary Kelly. That by said election and proceeding and sale the plaintiffs merged the lien for said improvement in said judgment; that by said election of said remedy by these plaintiffs this defendant
31 was not required to bid upon or procure the sale of the land of said Mary Kelly for a sum sufficient to protect and save from sale the property of this defendant; that the defendant was not notified in any way of said foreclosure, was not a party to the same, and the decree therein, does not purport to affect or include this defendant or any of its property or the property of said —— Miller. That the lien sued upon in the first paragraph of complaint is the identical lien foreclosed against Mary Kelly and the plaintiffs received and now retain the proceeds of the sale of said property of Mary Kelly with full knowledge of all the facts herein alleged.

Wherefore defendant says plaintiffs are estopped to proceed against the lands of the defendant as sought in said paragraph of complaint.

8. For fourth and further answer to the second paragraph of amended complaint said defendant says that the foreclosure pro-

ceeding alleged in said paragraph of complaint did not cover and include all of the property within fifty feet back from the property line of the said John F. Walton in its frontage upon the street alleged to have been improved; that within said distance were other lands owned by said Robert H. Kersey, by —— Stewart and —— Tomlinson and by this defendant and not included within said foreclosure, which said lands preceded in liability, if any, the greater portion of the lands of this defendant described in said paragraph of complaint which lie more than fifty feet from the line of said improvement.

9. The defendant for fifth and further answer to the second paragraph of the plaintiff's amended complaint alleges that within one hundred feet back of the line of improvement alleged in said paragraph of complaint and within one hundred feet back of the
32 line of the property of —— Kersey where it abuts upon the streets so improved there are lands owned by —— Stewart and —— Tomlinson which should bear, together with the lands of the defendant within said distance, their proportion of the costs of said improvement and defendant alleges, the plaintiffs may not elect which of said property owners within such distance from the improvement they will sue but they must pursue all property within such distance.

10. The defendant for sixth and further answer to the second paragraph of amended complaint, alleges that in the foreclosure proceedings alleged in said paragraph of complaint the plaintiffs included, proceeded against and sold certain lands back from the line of said street and remote from the improvement more than thirty feet towit: certain lands of Robert H. Kersey lying between the lands of this defendant described in said paragraph of complaint, and the line of said street; that the said lands of the said Robert H. Kersey were liable, if at all, in connection with the lands of this defendant within the second distance of fifty feet back from the line of said improvement.

11. The defendant for seventh and further answer to the second paragraph of amended complaint says that it admits the proceedings improvement and assessment alleged in said paragraph of complaint and admits the foreclosure of the lien of said assessment as against John T. Walton and the sale of his property as further alleged by the plaintiffs. The defendant avers, however, that within fifty feet back from the front line of said property of said Walton where the same abuts upon the street so improved there were other unplatted lands towit: lands of Robert H. Kersey, of —— Stewart, and of —— Tomlinson and of this defendant. It is further averred that within
one hundred feet back from the front line of said prop-
33 erty of said Walton where the same abuts upon the street so improved there were still other unplatted lands towit: lands of —— Stewart and —— Tomlinson, lands of said Kersey and lands of this defendant. It is also alleged that within one hundred and fifty feet back from the front line of the property of said Walton where the same abuts upon said street so improved there were still other unplatted lands towit: lands of said Kersey, lands of this de-

fendant and lands of —— Stewart and Tomlinson. That the plaintiffs who instituted and prosecuted the said proceedings in foreclosure against said John T. Walton elected to proceed against the property alone of the said Walton and wholly omitted from said proceeding to foreclose said lien the names and property of this defendant and of said Walton, which judgment was as alleged satisfied by a sale of the property of said Walton. That by said election and proceeding and sale the plaintiffs merged the lie*b* for said improvement in said judgment; that by said election of said remedy by these plaintiffs this defendant was not required to bid upon or procure the sale of the land of said Walton for a sum sufficient to protect and save from sale the property of this defendant; that this defendant was not notified in any way of said foreclosure, was not a party to the same and the decree therein does not purport to affect or include this defendant or any of its property or the property of said Kersey, Stewart or Tomlinson. That the lien sued upon in the first paragraph of complaint is the identical lien foreclosed against said Walton and the plaintiffs received and now retain the proceeds of the sale of said property of Walton with full knowledge of all the facts herein alleged.

34 Wherefore defendant says plaintiffs are estopped to proceed against the lands of the defendant as sought in said paragraph of complaint.

JOHN T. DYE,
L. J. HACKNEY,
Att'ys for Def'ts, C. C. C. & St. L. R'y Co.

35 And now the plaintiffs file demurrer to the second and third paragraphs of the separate answer of said defendant as follows:

Demurrer to 2nd & 3rd Answer to Amended Complaint.

STATE OF INDIANA, *County of Marion, ss:*

In the Marion —— Court, January Term, 1901.

No. —.

ROBERT L. PORTER ET AL.
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD CO. ET AL.

Come now the plaintiffs and demur*rer* severally to the second and third separate answers of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to the amended complaint and for cause of demurrer say that said second and third paragraphs severally and separately do not state facts sufficient to constitute a cause of defense to plaintiffs' complaint.

S. R. ARTMAN AND
GIFFORD & GIFFORD,
For Plaintiffs.

Also files separate and several demurrer to the fourth, fifth, sixth and seventh paragraphs of the said answer to the second paragraph of the amended complaint herein, as follows:

36 *Demurrer to* 4, 5, 6, & 7 *Answers to* 2*nd Par. Am. Complaint.*

STATE OF INDIANA, *County of Marion, ss:*

Marion Circuit Court, January Term, 1901.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY ET AL.

Come now the plaintiffs and demurrer severally to the 4th, 5th, 6th and 7th paragraphs of separate answer of the defendant Cleveland, Cincinnati, Chicago & St. Louis Railway Company to the second paragraph of amended complaint and for cause of demurrer says that said paragraphs of answer do not severally or separately state sufficient facts to constitute a defense to said paragraphs of complaint.

S. R. ARTMAN,
GIFFORD & GIFFORD,
For Plaintiff-.

Also files separate and several demurrer to the fourth, fifth, sixth and seventh paragraphs of said defendants' answer to the first paragraph of the amended complaint herein, as follows:

37 *Demurrer to* 4, 5, 6, & 7 *Ans. to* 1*st Par. Amended Complaint.*

STATE OF INDIANA, *County of Marion, ss:*

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY ET AL.

Come now the plaintiffs and demurrer severally to the fourth, fifth, sixth and seventh paragraphs of separate — of the defendant Cleveland, Cincinnati, Chicago and St. Louis Railway Company to the first paragraph of amended complaint and assigns for cause of demurrer that said paragraphs severally and separately do not state facts sufficient to constitute a cause of defense to said paragraphs of complaint.

S. R. ARTMAN AND
GIFFORD & GIFFORD,
For Plaintiff-.

38 And afterwards, towit: On the 17th day of May, 1901, being the 11th judicial day of the said May Term of this Court, before the same Hon. Judge, the following proceedings were had herein, viz:

Ruling on Demurrers to Answers to Amended Complaint.

"Come the parties by counsel and the court being fully advised doth now overrule the demurrer to the second paragraph of the answer to the amended complaint herein, to which ruling plaintiffs except and on motion, plaintiffs are ruled to reply to said second paragraph and the court now sustains the demurrer to the third paragraph of answer to the amended complaint herein and said defendant excepts and is ruled to plead over; and the court also sustains the separate and several demurrer to the fourth, fifth, sixth and seventh paragraphs of the answer to the first paragraph of the amended complaint herein, to which ruling of the court said defendant excepts and is ruled to plead over and the court also sustains the demurrer to the fourth, fifth, sixth and seventh paragraphs of the answer to the second paragraph of the amended complaint herein, to which ruling of the court said defendant excepts and is ruled to plead over."

And afterwards, towit: on the 25th day of May, 1901, being the 18th judicial day of the said May Term of this Court before the same Hon. Judge, the following proceeding was had herein, viz:
"Come the plaintiff and files reply herein as follows:"

39 *Reply to Ans. to Am. Complaint.*

STATE OF INDIANA, *County of Marion, ss:*

Marion Circuit Court.

No. 10583.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

Come now the plaintiff- and for reply to defendant's answers deny each and every allegation therein contained.

GIFFORD & GIFFORD AND
S. R. ARTMAN,
Attorneys for Plaintiff-.

40 And afterwards, towit: On the 25th day of February, 1902, being the 20th judicial day of the said February term of this court, before the same Hon. Judge, the following proceedings were had herein:—

Request for Special Finding.

"Come the parties by counsel and the defendant Railway Company requests the court to make and file a special findings of facts herein and its conclusions of law thereon. And this cause being at issue is now submitted to the Court for trial, finding and judgment. And the Court having heard all the evidence adduced, takes the same under advisement."

And afterwards, towit: On the 7th day of January, 1903, being the 3rd judicial day of the said January Term of this court, before the same Hon. Judge, the following proceedings were had herein, viz:

Default of Thomas, Robert, & Lillian Kersey.

"Come the parties appearing herein by counsel and it having been shown to the satisfaction of the court, that the defendants Thomas A. Kersey, Robert H. Kersey and Lillian Kersey has each been duly served with summons herein more than ten (10) days before the time fixed for said defendants to answer herein, and said defendants failing to appear, are now each three times loudly called in open court, and come not and herein wholly make default. And now on plaintiff's motion, this cause is submitted to the court as to said defaulting defendants and the evidence being heard, the court takes the same under advisement.

41 And afterwards, towit: on the 3rd day of June, 1903, being the third judicial day of the said June Term of this Court, before the same Hon. Judge, the following proceedings were had herein:

Filing Special Findings & Conclusions of Law.

STATE OF INDIANA, *County of Marion, ss:*

In the Marion Circuit Court.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Come now the plaintiffs by S. R. Artman and Gifford and Gifford their counsel and the defendant Railway Company by L. J. Hackney its attorney and the court having previously seen and heard all of the evidence in said cause and the argument of counsel and the court having heretofore been requested to make its special findings of fact and state its conclusions of law thereon does now file said findings of fact and conclusions of law as follows:

42 The Court having been requested to find the facts in this case and state its conclusions of law thereon, finds as follows:

Special Finding.

1. That the Common Council of the City of Lebanon, in the ounty of Boone and State of Indiana, did by a two thirds vote of ll the members of said council at a regular meeting of said coun- il, on the 27th day of January, 1896, adopt a declaratory resolution, eclaring the necessity for and their intention to improve West lain Street in the said city from the West Corporation line of said ity to the West side of Lebanon Street in said city. That in said eclaratory resolution said Council specified that said street should e improved by grading and paving the same and for the construct- ng of sidewalks, lawns, sewers and crossings on each side of said ortion of said street.

2. That said Common Council fixed the 24th day of February, 906, as the time and the Council Chamber of said city as the place hen and where those interested in said improvement should ap- ear before said Common Council and if they desired to do so object o said improvement. That said Common Council caused ten days' otice of said meeting to be given by publishing a notice of the ame for two consecutive weeks in the Lebanon Patriot, a weekly ewspaper printed and published in said city, said notice not bein addressed to property owners or others by name nor by specific de- cription of property but was addressed only to "all persons in- erested."

—. The court further finds that said Common Council did meet at he time and place provided for in their said notice and order to hear bjections of those interested in the construction of said street, and did hear and consider all objections made.

3 4. The Court further finds that on the 16th day of April, 1896, said Common Council did by a two thirds vote of all ts members at a regular meeting of said board adopt an ordinance rdering the improvement of said portion of said street and provid- ng and fixing in said ordinance the plans and specifications —— of aid improvement as provided in said declaratory resolution. That aid Common Council caused the Clerk of said city to give three veeks' notice in the said Lebanon Patriot for three weeks, that said Council would receive bids for the construction of said improvement n the 2*a*th day of June, 1896, said notice being addressed to all persons interested and containing no names of property owners or specific description of property. That in pursuance of said notice aid Council did receive bids for the construction of said proposed mprovement and these plaintiffs under the firm name of Porter, Bowlin & Hadley filed their bids with the Common Council. That aid Common Council accepted said bid of Porter, Bowlin & Hadley and on the said day said city through its Mayor and Common Council entered in to a contract with said plaintiffs in their said firm name for the construction of said improvement, which conduct was reduced to writing and signed by all said parties. By the terms of said contract, said Porter, Bowlin & Hadley were to construct said proposed improvement in accordance with the plans and specifica-

tion adopted in the resolutions and ordinances for such improvement, and to complete said improvement prior to the 14th day of December, 1896. That said Porter, Bowlin & Hadley were to construct said proposed improvement in accordance with the plans and specifications adopted in the resolutions and ordinances for such improvement and to complete said improvement prior to the 14th day of December, 1896. That the said Porter, Bowlin & Hadley
43½ were to have the following compensation for said work, to-wit: $5.10 per lineal foot.

5. That on the 14th day of November, 1896 the said Common Council of the city of Lebanon accepted said work as being fully completed in accordance with said contract and plans and specifications and on said day ordered the Civil Engineer of said city to prepare and file an estimate of the costs and expenses incurred in the construction and completion of said work.

6. That in pursuance to the order of said Board the said engineer of said City of Lebanon, prepared and submitted an estimate of the cost and expenses incurred in the construction of said work and estimated to the said city the amount it should pay by reason of its street and alley crossings and to the several tracts and parcels and only to the tracks and parcels severally of land which immediately fronted and abutted upon said street and improvement, the portion of said costs as each said parcel sustained by said improvement. That said assessment was made only by estimating to each such lot or parcel an amount which bore the same ratio to the whole cost of such improvement as the number of front feet of each such parcel of land bore to the entire number of front feet of said improvement.

—. That said estimate so filed was referred by said Common Council to the Street and Alley Committee composed of members of said Council to hear objections to said estimate and make the necessary corrections, if any therein. That the said Common Council fixed and appointed the 4th day of January, 1897 as the time and the Common Council Chamber of said City as the place where said Committee would hear objections to said report and caused the city clerk of said city to give notice of such meeting and the time and place where such objections should be made by publishing
44 a notice in said Lebanon Patriot for two weeks, which notice gave the time and place where parties interested would be heard on said assessments and was as follows, towit:

Notice of Main Street Assessment.

LEBANON, IND. *Dec.* 15, 1896.

Notice is hereby given that on the fourth (4) day of January, 1897, at ten o'clock A. M. in the Council Chamber of the City of Lebanon, Indiana, in the Mayor's office in said city, before the Commitee on Streets and Alleys of the Common Council, a hearing will be had on the final estimate, as submitted by H. S. Bosler (consulting and constructing engineer for the Common Council of the

City of Lebanon, Indiana) on the 14th day of December, 1896, of the costs of constructing brick roadway, curbs and sidewalks on West Main Street, from the west side of Lebanon Street to the west corporation line in the City of Lebanon, Indiana, pursuant to special ordinance for the improvement of said part of said street, and that at the same time and place, a hearing will be had by said Committee on said engineer's final estimate report. All persons interested, or aggrieved, are hereby notified of the time and place, when and where said estimate will be considered, and this is your notice, and you are hereby notified to appear and make objections, if any, to said final estimate report.

By order of the Common Council.

Attest: WILL A. TULL,
City Clerk.

(Published in the Lebanon Patriot Dec. 17, 1896 and each week thereafter for one week.) Proof recorded in Clerk's Record No. 6 at page 496.

8. That said Common Council met at the time and place
45 described in said notice by the order of said Board and considered said report, heard the objections made thereto, corrected and modified the same, and reported said estimate back to said Common Council as amended and corrected, and recommending its adoption and approval by said Common Council.

9. That on the 14th day of January, 1897, the Common Council at a regular meeting by a two thirds vote of all its members, accepted the said report as returned by said Committee and ordered the payment of the several amounts assessed against the several tracts of land assessed therein.

10. The court further finds that the following described tract of land of Mary Kelly is within the corporate limits of the said City of Lebanon, and is unplatted, towit: (Commencing in the center of the Crawfordville road three hundred and eighty feet east of the west line of the south west quarter of section 36, township 19 north, range 1 west, thence east two hundred and thirty feet to the right of way of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company; thence north west with the said right of way and on the south side thereof two hundred and fifty-four feet and five inches; thence south one hundred and thirteen feet to the place of beginning), to which was assessed $588.56. The court further finds that commencing at the center of the Crawfordsville road three hundred and eighty feet east of the west line of the southwest quarter of section 36, township 19 north range 1 west, and running east from said point 230 feet, that said 230 feet would not reach to the right of way of the said railroad company and that by running a line from said terminus of the aforesaid line parallel with the right of way of said railroad a distance of 230 feet would leave a strip of ground between said line so run and said right of way of
24 86/100 feet in width which last described tract is the
46 property of Thomas A. Kersey.

11. The court further finds that one John T. Walton was

at the time of the ordering of the payment of the said assessment on said street the owner of the following parcel and tract of ground fronting on the improved portion of said street, towit: Commencing in the center *if* the Crawfordville road 413½ feet west of the east line of the south-west quarter of the north-east quarter of section 36, township 19, north range 1 west, thence south 74 feet; thence north 63½ degrees west 161 feet; thence north 89 degrees east 144½ feet with the center of said Crawfordville road to the place of beginning. To which there was assessed for the construction of said street the sum of $273.73. The court further finds that John T. Walton nor any one else signed a waiver in writing and accepted the ten years in which to pay said assessment. The court further finds that there is a strip of land, commencing at the south-east corner of the aforesaid John T. Walton's land, running thence south four and seven-tenths feet to the right of way of the Cleveland, Cincinnati, Chicago and St. Louis Railway; thence northwesterly with said right of way 112½ feet to the south line of said Main Street; thence east 10½ feet; thence along the south-west boundary of said Walton land 103 feet to the place of beginning, lying between the aforesaid tract of land and the right of way of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. The court further finds that the said railroad company's right of way and roadbed lies immediately adjoining on the south-west side of the last described tract or strip of land. That said last described tract or strip of land lying along said right of way, was at the time of the filing of said assessment and now is the property of Robert H. Kersey and Lillian Kersey.

47 (The court further finds that said right of way of said railway company commencing at a point 413½ feet west and 78 7/10 feet south of where the center line of the Crawfordsville road intersects the east line of the south-west quarter of the northeast quarter of section 36, township 19, north range 1, west in said county and state. Thence west 53½ feet to the south east line of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company's right of way; thence north-west along and with said right of way 161 feet; thence north to the south line of said Main street in the said City of Lebanon, Indiana; thence east with said south line of said Main Street to the north-east line of the right of way of said Cleveland, Cincinnati, Chicago and St. Louis Railway Company, thence southeast along said north-east line of said right of way to the place of beginning. All of which is within 150 feet of the south line of said improved portion of said Main Street.)

12. The Court further finds that the following portion of the defendant Cleveland, Cincinnati, Chicago and St. Louis Railway Company's right of way and road bed lies immediately abutting on the north-east side of the tract of land hereinbefore last described in finding No. 10, and assessed in the name of Mary Kelly which portion of said right of way is as follows, towit: Commencing at a point 380 feet wast and 150 feet north of where the west line of the south-west quarter of section 36, township 9; north range 1, west intersects the center line of the Crawfordsville Road, thence east 65 feet paralleled to Main Street to the north-east side of the

right of way of the Cleveland, Cincinnati, Chicago and St. Louis Railway thence along and with the said north-east side of said right of way to a point due north of where the north side of said Main Street intersects with the south-east line of said railway; thence due south to the aforesaid intersection of said south side of said
48 railway's right of way with said Main Street; thence north-west with said right of way to a point due south of the place of beginning; thence due north to the place of beginning. And that said portion of said defendant's road bed and right of way is within 150 feet of the south line of the improved portion of said Main Street and that there is no other tracts of land or parcels of land lying between said street and the aforesaid portion of said railway, except those dexcribed in finding number ten.

13. The Court further finds that on the 4th day of March, 1897, Porter, Bowlin & Hadley filed their complaint in the Boone Circuit Court in cause No. 197 against Mary Kelly and her husband Patrick Kelly, without other party or parties to foreclose said assessment against the hereinbefore described tract of land, assessed in the name of Mary Kelly on said improvement of Main Street and first described in finding No. 10 above. That said Kelly and Kelly were on the 4th day of March, 1897 duly served with summons issued out of said court, to appear and answer in said cause on March 15, 1897. That said defendants on March 16, 1897 failing to appear were duly called and defaulted in said cause, and a foreclosure of said lien decreed by said court against said tract of land towit: Commencing at the center of the Crawfordsville Road, thence 380 feet east to the west line of the southwest quarter of section 36, township 19 north range 1 west, thence east 230 feet to the right of way of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company; thence north-west with said right of way and on the south side thereof 254 feet and five inches; thence south 113 feet to the place of beginning. The sum of $597.13 principal and interest and the further sum of $65.00 attorneys' fees and costs taxed at $8.50 and accruing cost, which judgment was without relief from valuation or appraisement laws. That on
49 the 25th day of March, 1897, a copy of said decree in said cause No. 187 was duly issued out of said Boone Circuit Court to the sheriff of said county; that said sheriff advertised said lands described in said decree according to law by publishing the same in the Lebanon Patriot for four weeks prior to said date and by posting notices in public places one of which was posted at the court house in said city of Lebanon, to sell in satisfaction thereof on April 24, 1897, at the court house door in said Boone county, Indiana between the hours of 10 A. M. and 4 P. M. of said day. And that on said day in conformity with said notice said sheriff did offer the rents and profits of said land for a period of seven years and received no bids, and then offered the fee simple of said tract of land aforesaid. That Smith F. Cox bid therefor the sum of $75.00 and that being the highest and best bid said land was sold to said Cox, and that said Cox paid his said bid and received a certificate of purchase from the said sheriff. That said land was not redeemed

and that the said sheriff of said county of Boone did on the 10th day of April 1901 execute*d* and deliver*ed* sheriff's deed on said certificate of purchase for said lands to Nathaniel Kersey the then holder of said certain certificate of purchase. The Court further finds that there was due on said decree at the date of sale, towit: on April 24, 1897, as principal, interest and attorney fees the sum of $666.32 and cost of sale of $25.85 making a total of $692.17 leaving a balance after the sale of said land due on said assessment of $617.17 and that there is now due on said assessment the sum of $771.70 and $65.00 attorneys' fees.

14. The Court further finds that on the 4th day of March, 1897, Porter, Bowlin & Hadley filed their complaint in writing in
50 the Boone Circuit Court in cause No. 198 against John T. Walton without other party or parties to foreclose the assessment against the lands herein described as assessed in the name and to the said Walton for the improvement of said Main Street in said City of Lebanon. That a summons was duly issued on said complaint out of the Clerk's office of said court, which summons was served by the sheriff of said Boone County on the said John T. Walton commanding him to appear and answer in said cause on the 19th day of March, 1897. That said Walton failed to answer and was by said court called and defaulted in said cause. That the court found there was due on said lien the sum of $277.88 and the further sum of $35.00 attorney fees, making a total of $312.88 and cost taxed at $6.00 and ordered the sale of said tract of land described as follows: Commencing in the center of the Crawfordsville road 413½ feet west of the east line of the south-west quarter of the north-east quarter of section 36, township 19 north range 1 west; thence south 74 feet; thence north 63½ degrees west 161 feet; thence north 89 degrees east 144½ feet with the center of said Crawfordsville road to the place of beginning, without relief from valuation or appraisement laws in the payment of said sum and the cost and the accruing cost thereon. That on the 25th day of March, 1897, a certified copy of said decree was duly issued out of the Clerk's office of the Boone Circuit Court to the sheriff of said county commanding said sheriff to sell said real estate in satisfaction of said judgment. That the said sheriff on the 1st day of April, 1897 advertised as provided by law, towit: by publishing said notice for four weeks in the said Lebanon Patriot, and by posting five printed notices in public places, one of which was posted at the court house in said county of Boone, said land to be sold at the court
51 house door in said Boone County on April 24th, 1897 between the hours of 10 A. M. and 4 P. M. That said sheriff did on said 24th day of April 1897 between the hours of 10 A. M. and 4 P. M. offer the rents and profits of said tract of land for a period of seven years without relief, and received no bids. Said sheriff then offered the fee simple of said tract without relief, and R. H. Kersey bid therefor the sum of $12.00, and said sum being the only bid thereon the same was duly sold to the said Kersey who paid in cash his said bid and received a certificate of sale from said sheriff for said land. That said land was not redeemed and that

the said sheriff of said county did on the 16th day of April, 1901, execute and deliver a deed for said land to R. H. Kersey the then holder of said certificate of purchase on the said sheriff's sale. The court finds that there was due on said decree, principal, interest and attorneys' fees on the day of said sale the sum of $314.80 and cost taxed at $24.16. Leaving of principal, interest and attorneys fees the sum of $314.80 and a balance of cost of $12.16 after the sale of said land and that there is now due on said assessment the sum of $358.90 principal and interest and the further sum of $35.00 attorney fees and the costs of this suit.

15. And the court further finds that there were no further acts, proceedings, or findings of said city or its officers of and concerning said improvement and assessments than as specially found herein, and that the defendant Railway Company, was not otherwise a party to said proceedings and assessment than as herein specially found, nor was its said property otherwise assessed or affected than as herein specially found, and said Railway Company was not named as, nor did it appear as a party in interest in any notice, contract, report, assessment or record, relating to said improvement, nor was
52 its property assessed for or on account of said improvement in manner or form other or different from that herein specially found.

HENRY CLAY ALLEN, *Judge.*

Conclusion of Law.

On the foregoing facts the court declares the law to be with the plaintiffs and that the plaintiffs are entitled to a judgment against the defendant Railway Company for the amounts found in findings No. 14. And that the plaintiffs are entitled to a judgment *in rem* as against the lands owned by Kirby and Kirby as shown in finding 10 & 11, and that said lien be foreclosed as against said land and upon sale of said lands if there should remain any part of the amount found due in said finding unpaid after such sale that the plaintiffs recover such remainder from the defendant Railroad Company. To each of which conclusions of law the defendant Railroad Company excepts.

HENRY CLAY ALLEN, *Judge.*

53 *Decree.*

And to each of said conclusions of law the defendant Railway Company at the time objects and excepts and 120 days' time is given said defendant to file a Bill of Exceptions and the court now orders and decrees that a strip of ground the property of John A. Kersey, twenty four and 86/100 feet in width two hundred and fifty-four (254) feet and five (5) inches in length lying between the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the following described tract of ground towit: Commencing in the center of the Crawfordsville Road Three hundred and eighty (380)

feet east of the west line of the south-west quarter of section thirty-six (36) township nineteen (19) north of range one (1) west, thence east two hundred and thirty (230) feet; thence northwest with said right of way of said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and on the south side thereof two hundred and fifty-four (254) feet and five (5) inches; thence south one hundred and thirteen (113) feet to the place of beginning, all in Boone county, and State of Indiana, be subject to the payment and sold for the payment of $836.70. That said land be sold without relief from valuation or appraisement laws.

And the Court further orders and decrees that in the event that the aforesaid described strip of land of Thomas A. Kersey shall fail to sell for a sufficient amount to pay said judgment, principal, interest and cost and accruing cost, then the remaining amount shall be a lien upon that part of the real estate of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company lying immediately adjacent to said strip or tract of ground of said Thomas A. Kersey, and which is within one hundred and fifty (150) feet of the improved portion of said West Main Street in the City of Lebanon, County of Boone and State of Indiana. That said Railway
54 Company shall pay and satisfy such amount remaining unpaid of the principal, interest, cost and accruing cost after the sale of said strip of ground first ordered sold as the property of said Thomas A. Kersey above referred to.

It is further ordered and decreed by the court that the following described real estate being the property of Robert H. Kersey and Lillian Kersey, towit: Commencing at the south-east corner of the following described tract of land towit: Commencing in the center of the Crawfordsville Road four hundred thirteen and one-half (413½) feet west of the east line of the south-west quarter of the northeast quarter of section thirty-six (36) township nineteen (19) north of range one (1) west; thence south 74 feet; thence north 63½ degrees west 161 feet; thence north 89 degrees east 144½ feet west the center of the Crawfordsville road to the place of beginning; thence from the southeast corner of said last described tract south four and seven-tenths (4 7/10) feet to the right of way of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company; thence northwesterly with said right of way of said Railway Company one hundred and twelve and one-half (112½) feet to the south line of said street in said city of Lebanon, Indiana; thence east ten and two-tenths (10 2/10) feet; thence along the southwest boundary of said last described tract of real estate, the same being the tract from which this description starts, one hundred and three (103) feet to the place of beginning, all in the City of Lebanon, County of Boone, and State of Indiana is subjected to the lien and to the payment of the balance of assessment on West Main Street in said City of Lebanon in the sum of $406.09 and upon failure to pay the same that said described tract of land be sold for the payment of said lien without relief from valuation or appraisement laws. And
55 upon the failure of said last described tract of land to pay and satisfy said judgment, principal, interest and cost and accru-

ng cost it is further ordered and decreed by the court that the amount so remaining unpaid after the sale of the aforesaid tract shall become a lien on that portion of the real estate of the defendant Cleveland, Cincinnati, Chicago & St. Louis Railway Company which is described as follows, towit: Commencing at a point 413½ feet west and 78 7/10 feet south of where the center line of the Crawfordsville Road intersects the east line of the southwest quarter of the northeast quarter of section 36, township 19, north of range one (1) west in said county and state, thence west 53½ feet to the south-east line of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company's right of way; thence northwest along and with said right of way 161 feet; thence north to the south line of said Main Street in said city of Lebanon, Indiana; thence east with said south line of said Main Street to the north-east line of the right of way of said Cleveland, Cincinnati, Chicago & St. Louis Railway Company; thence south-east along said north-east line of said right of way to the place of beginning. All of which is within one hundred and fifty (150) feet of the south line of said improved portion of said Main Street.

It is further ordered and decreed by the Court that upon the failure of the owners of the aforesaid real estate first liable for the payment of said liens, or either of them, to pay said judgment or either of them a copy of this decree shall be issued by the Clerk of the Marion Circuit Court directed to the Sheriff of Boone County, Indiana, directing him to sell without relief from valuation or appraisement laws the real estate heretofore set out and first
56 liable for the payment of said lien, or so much thereof as may be necessary to pay said judgment declared a lien on said parcels of real estate as herein ordered and in the event that said real estate first declared liable for the payment of said judgment or either parcel thereof shall fail to bring an amount sufficient to pay the principal, interest, cost and accruing cost on said decree that the amount so remaining shall be collected off of and from the defendant Railway Company aforesaid without relief from valuation or appraisement laws, and make due return of his proceedings herein to the Clerk of the Marion Circuit Court.

All of which is ordered, adjudged and decreed by the court.

56½ And thereupon, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company filed herein its motion and written reasons for a new trial, which motion and written reasons therein stated are in the words and figures following, towit:

Filing Motion for New Trial.

STATE OF INDIANA, *Marion County:*

In the Circuit Court.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY CO.

Motion for New Trial.

The defendant The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, moves the court for a new trial herein for each of the following causes:

1st. The damages found and assessed by the court are excessive.

2nd. The Court erred in assessing the amount of the plaintiff's recovery in that the sum assessed is too large in the sum of $100.

3rd. The decision of the Court is not sustained by sufficient evidence.

4th. The decision of the Court is contrary to the evidence.

5th. The decision of the Court is contrary to law.

6th. The Court erred in admitting over the objection and exception of this defendant the copy of notice of improvement, together with the printed proof of publication subscribed and sworn
57 to by S. N. Cragum, February 17, 1896, and as a part of the record of proceedings by the council of the City of Lebanon.

7th. The Court erred in admitting in evidence over the objection and exception of this defendant, and as proof of notice to contractors, together with the affidavit of S. N. Cragum, subscribed and sworn to the 18th day of June, 1896, as proof of the publication of such notice.

8th. The Court erred in admitting in evidence over the objection and exception of this defendant, a notice to property owners of the hearing to be had upon final estimate of the city engineer in connection with the affidavit of S. N. Cragum subscribed and sworn to, 4th day of June, 1897 in proof of the publication of such notice.

9th. The Court erred in admitting over the objection and exception of this defendant, the ordinance of the City of Lebanon, authorizing the issue of bonds for the cost of improvement.

10th. The Court erred in sustaining the objection of the plaintiff to the following question asked of this defendant's witness, Hadley Baldwin:

Q. I will ask you to state whether or not the improvement of Main Street along the line of Kersey tract was of any benefit to the property and right of way of the defendant Railway Company immediately back from the Kersey property?

11th. The Court erred in rejecting the offer of this defendant to prove by its witness, Hadley Baldwin, that the improvement of Main Street in front of Kersey's property would not be beneficial to the

property and right of way of this defendant, and would not and could not have increased its value directly or indirectly.

12th. The Court erred in sustaining the objection of the
58 plaintiff to the following question asked of this defendant's witness, Hadley Baldwin:

Q. I will ask you to state whether or not the improvement of Main Street along the line of what has been called here the Kersey property, and as indicated by the map in evidence, did or could in any way have increased the value of the right of way and the property of the defendant Railway Company?

13th. The Court erred in rejecting the offer of this defendant by its witness, Hadley Baldwin, that the improvement of Main Street could not have been and was not beneficial to, and did not and could not have increased the value of this defendant's right of way directly or indirectly.

L. J. HACKNEY,
Attorney for Defendant Railway Company.

Mo. Overruled & Exception.

And the Court being sufficiently advised in the premises overruled said motion for a new trial, to which ruling and judgment of the Court said defendant at the time excepted.

And thereupon said Railway Company moved the Court to modify and amend its findings, judgment and decree herein, which said motion is in the words and figures following, towit:

Filing Motion to Modify.

59 STATE OF INDIANA, *Marion County:*

In the Circuit Court.

ROBERT L. PORTER ET AL.
vs.
CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY CO.

Motion to Modify Decree.

Comes the defendant Railway Company and moves the Court to modify its judgment and decree herein in each of the following particulars:

1st. That the amount found and adjudged to be owing primarily against the property of John A. Kersey, and secondarily against this defendant, towit: $836.70, be so modified that it be adjudged and decreed that said sum shall, instead, be the sum of $771.70.

2nd. That the amount found and adjudged to be owing primarily against the property of John A. Kersey, and secondarily against this defendant, towit: $836.70 to be modified and reduced by substract-

ing therefrom the sum of $65, allowed to the plaintiffs as and for attorney's fees in this suit.

3rd. That the amount found and adjudged to be owing primarily against the property of Robert H. Kersey and Lillian Kersey, and secondarily against this defendant, towit: $406.09, be so modified, adjudged and decreed that said sum shall instead be the sum of $358.90.

4th. That the amount found and adjudged to be owing primarily against the property of Robert H. Kersey and Lillian Kersey, and secondarily against this defendant, towit: $406.09 be modified and reduced by substracting therefrom the sum of $35, allowed to the plaintiff as and for attorney's fees in this suit.

60 5th. That the amount found and adjudged to be owing primarily against the property of Robert H. Kersey and Lillian Kersey, and secondarily against this defendant, towit: $406.09, be modified and reduced by substracting therefrom the sum of $35, allowed as and for attorney's fees, and the further sum of $12.19, excess above the amount specially found by the Court to be due and owing on account of said property.

6th. That the several findings, judgments, and decrees of the Court primarily against the property of Mary Kelly and John F. Walton be modified and reduced by subtracting therefrom the sum of $112.19, said $100 being the sum allowed in this suit for plaintiff's attorney's fees, and said $12.19 being an excess above the amount specially found to be due and owing on account of property found by the court to be that of Robert H. and Lillian Kersey.

7th. That the judgment and decree of the Court that the property therein described to be sold as the property of John A. Kersey be so modified as to direct the sale thereof as the property of Mary Kelly.

8th. That the decree of the Court be modified and amended in its direction that the property therein described to be sold as the property of Robert H. and Lillian Kersey, be decreed and ordered to be sold as the property of John F. Walton.

And said defendant says as to its above first, second, third, fourth, fifth and sixth specifications severally that the respective sum- given therein to be substracted from said amounts stated in the decree are excessive and unauthorized by either the pleadings, the evidence or the law.

L. J. HACKNEY,
Attorney for Defendant.

61 *Motion to Modify Overruled & Exception.*

And the Court being sufficiently advised in the premises, overruled said motion, to which ruling said defendant at the time objected and excepted.

Prayer for Appeal.

And thereupon the said defendant Railway Company prayed an appeal to the Appellate Court of Indiana, which appeal was by the Court granted upon filing by said defendant, within 120 days of an appeal bond in the sum of $1500, with the Federal Union Surety Company as surety, and 120 days from this date were allowed by the Court to said defendant in which to file its Bill of Exceptions herein.

And afterwards, towit: on the 22nd day of September, 1903, being the 14th judicial day of the said September term of this Court before the same Hon. Judge, the following proceeding was had herein:

Filing Transcript of Evidence.

"Comes now William S. Garber, official reporter of this Court and files with the Clerk of the same, a longhand transcript of the evidence given on the trial of this cause, taken in shorthand, at the time."

62 And afterwards, towit: on the 23rd day of September, 1903, being the 15th judicial day of the said September Term of this Court, before the same Hon. Judge, the following proceeding was had herein:

Filing Bill of Exceptions.

"Comes the parties by counsel and the defendant Railway Company files its *Bill of Exceptions* in which Bill is incorporated the transcript of the evidence heretofore filed with the Clerk of this Court in this cause, which said *Bill of Exceptions* is as follows:"

63 *Bill of Exceptions.*

Stenographer's Transcript.

STATE OF INDIANA, *County of Marion, ss:*

In the Marion Circuit Court, February Term, 1903, Honorable Henry Clay Allen, Judge.

No. 10583.

ROBERT L. PORTER ET AL.
vs.
C., C., C. & ST. L. RAILWAY COMPANY.

(Filed Sep. 22, 1903, Wm. E. Davis, Clerk.)

Appearances.

For Plaintiff, George B. Gifford, Esq.
For Defendant, Judge J. L. Hackney.

W. S. Garber. Walter N. Carpenter.

Garber & Carpenter,

Stenographers and Law Reporters,

(Official Reporters Marion County Courts)

Room 51, Court House,

Indianapolis, Indiana.

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John L. Wade, Recalled.....			
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" " reconsideration .....
" " declaratory resolution.....
" " proof of publication.....
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" " the opening of bids.....
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65½ *Bill of Exceptions.*

(Filed Sep. 23 1903 Wm. E. Davis, Clerk.)

STATE OF INDIANA, *County of Marion, ss:*

In the Marion Circuit Court, February Term, 1903, Honorable Henry Clay Allen, Judge.

No. 10583.

ROBERT L. PORTER ET AL.
vs.
C., C., C. & ST. L. RAILWAY COMPANY.

Be it remembered, That on the 25th day of February, 1903, the same being the 20th juridical day of the February Term, 1903, of the Marion Circuit Court, of Marion County, State of Indiana, the following proceedings were had in the above entitled cause, before the Honorable Henry Clay Allen, Judge of said Court, towit:

The cause being at issue the same came on for trial before the Court and a jury, George B. Gifford, Esq., appearing as counsel for the plaintiff, and Judge L. J. Hackney appearing as counsel for the defendant.

And be it further remembered That before the trial was begun, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present William S. Garber, Official Reporter of said Court, to take down in shorthand the oral evidence, including both questions and answers, and note all the rulings of the Judge in respect to the admission and rejection of evidence, and the objections and exceptions thereto, and the documentary evidence, on the trial of said cause, the said William
66 S. Garber having been at the time of his appointment, duly sworn to faithfully perform his duties as such official shorthand reporter, which said appointment and his official oath as such reporter are of and among the records of said Court.

And be it further remembered That said official reporter was present and took down in shorthand the oral and documentary evidence given upon the trial of said cause, including both questions and answers, and noted all of the objections made to the admission of evidence, and all of the rulings of the Court with respect to the admission and rejection of evidence and the exceptions taken thereto.

And the defendant having requested said official reporter to furnish it with a complete Transcript of said Evidence, objections, rulings of the Court thereon, and the exceptions taken thereto, including all documentary evidence, a Typewritten Transcript of the same was made by said official reporter, and by him filed with the Clerk of the Marion Circuit Court, of Marion County, State of Indiana,

on the 22nd day of September 1903; which Typewritten Transcript is in the words and figures following:

That is to say:

The plaintiff, to maintain the issues on his behalf, offered and introduced the following evidence, to-wit:

67 *Direct Examination of R. W. Roberts.*

R. W. ROBERTS, a witness for the plaintiff, being first duly sworn, testified as follows:

Examination in chief.

Questions by Senator GIFFORD:

Q. State your name.

A. R. W. Roberts.

Q. What official position do you occupy in the city of Lebanon, if any?

A. Deputy City Clerk.

Q. What is the record you have there?

A. The Clerk's Record Number Six.

Q. You may turn to your record and read the entry there with relation to the improvement, the first entry with relation to the improvement of West Main Street in the City of Lebanon. What page is that?

A. Page 219.

Q. You may read the entry to the Court.

A. (Reading:) "Councilman Hootan offered the following, to-wit:

Be it resolved by the Common Council of the City of Lebanon, (two-thirds of the members thereof concurring), that said Council hereby declares it to be necessary to improve Main street in this city from the west corporation line thereof east to the Indianapolis Avenue, a distance of thirty-seven hundred feet, (being more than one full square), by grading the road bed thereof to a width of twenty-six feet from the west corporation line to the west side of West street, and from the west side of West street to the west side of East street to a width of forty-two feet, and from the west side

68 of East street to Indianapolis avenue to a width of twenty-six feet, to a depth of seventeen inches, by repairing the roadbed with six inches broken stone and two inches of sand well rolled; by placing upon said broken stone foundation a hard burned paving brick set in an upright position and at right angle with the curbstone, said brick to be burned especially for street paving purposes; upon the surface so completed there is to be a filling of cement flush with the top or surface of the roadbed, and the whole to be covered with a slight coat of good sharp sand; the curbing is to be of the best quality of stratified limestone"——

Would you permit me to say a word?

The COURT: What do you say, gentlemen?

Judge HACKNEY: I am not objecting, if it does not go into the record.

The WITNESS: The point I want to make is that this is tolerably lengthy, and this resolution was amended and it is not the resolution upon which the street was finally improved.

The COURT: If you want this in at all you had better just let it be considered in evidence.

Senator GIFFORD: If there was a change in this, I presume this has no business in at all.

The WITNESS: This is the way it starts, and this was the first resolution.

Q. In what respect is that changed from the other?

A. It cuts off the part from Lebanon street east to Indianapolis Avenue.

69 Senator GIFFORD: I expect it had better all go in, your Honor. I will offer the entire entry on pages 219, 220 and 221.

The said entry was admitted and read in evidence, the same being in the words and figures following, towit:

"Councilman Hooten offered the following, towit:

Be it resolved by the common council of the City of Lebanon (two-thirds of the members thereof concurring) that said council hereby declares it to be necessary to improve Main Street in this city, from the west corporation line thereof, east to the Indianapolis Avenue, a distance of thirty-seven hundred feet, (being more than one full square), by grading the road bed thereof to a width of twenty-six feet from the west corporation line to the west side of West street, and from the west side of West street to the west side of East street to a width of forty-two feet, and from the west side of East street to Indianapolis Avenue to a width of twenty-six feet and to a depth of seventeen inches, by repairing the road bed with six inch broken stone and two inches of sand, well rolled, by placing upon said broken stone foundation a hard burned paving brick set in an upright position and at right angles with the curb stone, said brick to be burned especially for street paving purposes; upon the surface so completed there is to be a filling of cement flush with the top of the surface of the road bed, and the whole to be covered with a slight coat of good sharp sand; curbing to be of the best quality of stratified lime-stone free from all flaws or seams, or imperfections of any kind, to be five inches on top, twenty-one
70 inches deep, and not less than four feet long, to be hammer dressed on gutter surface a distance of ten inches, and on back a distance of not less than two inches.

There is to be constructed on the line of work so many catch basins as the engineer may direct, to have a circular radius of three feet six inches from inside brick line to inside brick line; the circular caps to be cut on a radius of four feet, and the mouth of the inlet to be two feet six inches wide, the whole to be built with the

best quality of Portland cement mixed with mortar and to be placed at such point as the engineer may direct. All of which is more fully set out in the detailed specifications, plans and drawings now on file in the office of the City Civil Engineer of said city.

SECTION 2. The costs of said improvement shall be assessed per lineal front foot as provided in the act of the General Assembly of the State of Indiana approved March 8th, 1889, and the amendments thereto, (known as the Barrett Law), and street improvement certificates will be issued in payment of all assessments for which the proper application shall be made, and contractors will be required to accept said assessments and certificates in payment of the contract price.

SECTION 3. The Common Council hereby fixes the Council Chamber of said City, and the 17th day of February, 1896, at seven o'clock P. M., as the time and place to hear objections of the property owners along the line of said improvement to the necessity for the construction thereof, and the Clerk is hereby directed to give ten days' notice of the passage of this resolution and of the time and place when and where such property owners can make such objections, which notice shall be given for two weeks in some
71 newspaper of general circulation published in said city.

A. P. W. HOOTON, *Councilman.*

Councilman Bechtell moved that the resolution of Councilman Hooten be amended to read, from the east line of West street to the west side of Lebanon street, and from the east side of Lebanon street to the east side of Meridian street.

Councilman Busby, G. W., moved that the rules be suspended and the ordinance be placed on its passage as amended. Voting aye on the suspension of the rules, Councilmen, Bechtell, Busby, G. W. Hooton, Osborne and Spickelmire. Voting No, None. The Mayor declared the rules suspended. Roll call on the passage: Bechtell, Busby, G. W., Hooton, Osborne and Spickelmire voting Aye. Voting No, none.

There being two-thirds of the full membership of the council present and voting aye, voting no, none, the Mayor declared the ordinance as amended passed and adopted by a two-thirds vote of the full council, this 20th day of January, 1896.

R. C. GARRETT, *Mayor.*

Attest:

WILL A. TULL,
City Clerk.

72 By Judge HACKNEY:

Q. Do I understand that the next resolution amends this, or is it a new resolution entirely?

A. It will be a new resolution entirely; this will be amended by a new resolution.

Q. It don't refer to this at all?

. A. No sir, the street was not improved the distance that was provided for in this.

By Senator GIFFORD:

Q. Just turn to the other and read the other.

A. The next we have is a motion to amend to read from the east side of West street to the west side of Lebanon street. That is page 221.

The COURT: You better let all this go in evidence.

Senator GIFFORD: I will offer this entry in evidence then, your Honor.

The said entry was admitted and read in evidence, the same being in the words and figures following, towit:

73 Councilman Spikelmire offered the following, towit:

Be it resolved by the Common Council of the City of Lebanon, Indiana, (two-thirds of the members thereof concurring) that said Common Council hereby declares it to be necessary to improve Lebanon street in said city from the Big Four Railroad to the north side of Washington street, a distance of one thousand one hundred and fifty-one feet, (being more than one full suare), by grading the road bed thereof to a width of forty-two feet from the Big Four Railroad to the north line of Washington street to an average depth of seventeen inches by preparing the road bed with six inches of broken stone and two inches of sand, well rolled; by placing upon said broken stone foundation a hard burned paving brick set in an upright position and at right angle with the curb stone, said brick to be burned especialy for street paving purposes; upon the surface so completed there is to be a filling of cement flush with the top or surface of the road bed; and the whole to be covered with a slight coat of good sharp sand. The curbing is to be of the best quality of stratified lime stone, free from flaws or seams or imperfections of any kind, to be five inches on top, twenty-one inches deep, and not less than four feet long, to be hammer dressed on gutter surface a distance of ten inches, and on the back a distance of not less than two inches. There is to be constructed on the line of work so many catch basins as the engineer may direct, to have a circular radius of three feet six inches from inside brick line to inside brick line; the circular caps to be cut on a radius of four feet, and the mouth of the inlet to be two feet and six inches wide, the whole to be

74 built with the best quality of Portland cement, mixed with mortar, and to be placed at such point as the engineer may direct, all of which is more fully set out in the detailed specifications, plans and drawings now on file in the office of the City Civil Engineer of said City.

SECTION 2. The cost of said improvement shall be assessed per lineal foot as provided in the act of the General Assembly of the State of Indiana, approved March 8th, 1889, and the amendments thereto, (known as the Barrett Law), and street improvement certificates will be issued in payment of all assessments for which the proper applications shall be made, and the contractors will be re-

quired to accept said assessments and certificates in payment of the contract price.

SECTION 3. The Common Council hereby fixes the Council Chamber of said City and the 17th day of February, 1896, at seven o'clock P. M., as the time and place to hear objections of the property owners along the line of said improvement to the necessity for the construction thereof, and the City Clerk is hereby directed to give ten days' notice of the passage of this resolution and of the time and place when and where such property owners can make such objections, which notice shall be given for two weeks in some newspaper of general circulation, published in said city.

J. W. SPICKELMIRE, *Councilman.*

Councilman Hooton moved that the rules be suspended and the resolurion be placed on its passage. Councilmen Bechtell, Busby, G. W., Hooton, Osborne and Spickelmire voting aye; voting
75 no, none. The Mayor declared the rules suspended. Roll Call on passage resulted as follows, towit: Councilmen, Bechtell, G. W. Busby, Hooton, Osborne, and Spickelmire voting aye. Voting no, none. Two-thirds of the full membership of the full Council present and voting aye. Voting no, none. The Mayor declared the resolution passed and adopted this 20th day of January, 1896, by a two-thirds vote of the full Council.

R. C. GARRETT, *Mayor.*

Attest:
WILL A. TULL,
City Clerk.

Q. Now what is the next entry?
A. The next entry is at page 227.

Senator GIFFORD: May the Court please, I will offer this entry in evidence.

The said entry was admitted and read in evidence, the same being in the words and figures following, to-wit:

"Councilman Hooton having presented the resolution for the improvement of Main Street and having voted in the affirmative on the passage of the resolution by the Council, moved the resolution be reconsidered. Motion carried. And the aye and no vote being called for the vote was taken and is as follows, to-wit: Councilmen Busby E. D. voting aye. Busby G. W. voting no. Hooton, Osborne and Spickelmire voting aye. Two-thirds of the full
76 council voting aye, one member voting no, the Mayor declared the resolution reconsidered by a two-thirds vote of the full Council, this 27th day of January, 1896. After which Councilman Hooton asked to withdraw the resolution, which was done by consent of the Council."

The COURT: That is, the original resolution was withdrawn?
The WITNESS: Yes sir.
The COURT: That takes out everything you have just read?
The WITNESS: I do not care about passing on that. Now next

comes the declaratory resolution passed. It is on the same page, page 227.

Senator GIFFORD: May the Court please, we now offer that entry in evidence, on page 227.

The said entry was admitted and read in evidence, the same being in the words and figures following, to-wit:

"By consent of the Council the Mayor referred back to the presentation of ordinances, and Councilman Hooton offered the following, towit:

Be it resolv*dc* by the Common Council of the City of Lebanon, Indiana, (two-thirds of the members thereof concurring), that said Common Council hereby declares it to be necessary to improve Main street in said City from the west corporation line thereof east
77 to Lebanon street, a distance of two thousand five hundred and fifty feet (being more than one full square) by grading the roadbed thereof to a width of twenty-six feet from the west corporation line to the west side of West Street, and from the west side of West street to Lebanon street to a width of forty-two feet, to an average depth of seventeen inches; by preparing the roadbed with six inches of broken stone and two inches of sand well rolled; by placing upon said broken stone foundation a hard burned paving brick set in an upright position and at right angle with the curbstone, said brick to be burned especially for street paving purposes; upon the surface so completed there is to be a filling of cement flush with the top or surface of the roadbed, and the whole to be covered with a slight coat of good sharp sand; the curbing to be of the best quality of stratified limestone free from flays or seams or imperfection of any kind; to be five inches on top, twenty-one inches deep and not less than four feet long, to be hammer dressed on gutter surface a distance of ten inches and on the back a distance of not less than two inches.

The sidewalk to be constructed of the best quality of Germania cement or of vitrified sidewalk paving block set on a bed of six inches of sand and three inches of grout, to be six feet wide from the west corporation line to the west side of West street, and from the west side of W*C*st street to Lebanon street twelve feet wide; the sidewalk to be six feet wide is to be set back from the property line one and one-half feet, the sidewalk to be twelve feet wide to extend from the property line to the inside of the curbing.

There is to be constructed on the line of work so many
78 catch basins as the engineer may direct, to have a circular radius of three feet six inches from inside brick line to inside brick line; the circular caps to be cut on a radius of four feet and the mouth of the inlet to be two feet six inches wide, the whole to be built with the best quality of Portland cement mixed with mortar and to be placed at such point as the engineer may direct, all of which is more fully set out in the detailed specifications, plans and drawings now on file in the office of the City Civil Engineer of said City.

SECTION 2. The costs of said improvement shall be assessed per lineal front foot as provided in the Act of the General Assembly

of the State of Indiana, approved March 8, 1899, and the amendments thereto, (known as the Barrett Law), and street improvement certificates will be issued in payment of all assessments for which proper applications shall be made, and the contractors will be required to accept said assessments and certificates in payment of the contract price.

SECTION 3. The Common Council hereby fixes the Council Chamber of said City and the twenty-fourth day of February, 1896, at seven o'clock P. M., as the time and place to hear objections of the property owners along the line of said improvement to the necessity for the construction thereof, and the City Clerk is hereby directed to give ten days' notice of the passage of this resolution and of the time and place and when and where such property owners can make such objections; which notice shall be given for two weeks in some newspaper of general circulation published in said city.

A. P. W. HOOTON, *Councilman.*"

79 "Councilman Busby, E. D., moved that the rules be suspended and the resolution be placed on its passage. Roll Call on suspension resulted as follows, towit: Busby, G. W., Hooton, Osborne, and Spickelmire voting aye, voting no, none. The Mayor declared the rules suspended. Roll Call on passage resulted as follows: Busby, E. D., Busby, G. W., Hooton, Osborne and Spickelmire voting aye, voting no, none. Two-thirds of the full membership of the Council present and voting aye, voting no, none. The Mayor declared the resolution passed and adopted by unanimous vote of all the councilmen present, this 27th day of January, 1896.

WILL E. OSBORNE,
Councilman, Acting Mayor.

Attest:
WILL A. TULL,
City Clerk."

Judge HACKNEY: Now it is understood that all the evidence before this resolution is withdrawn?

Senator GIFFORD: All the entries read from pages 219, 220 and 221 is withdrawn. That may all go out.

Q. Now, Mr. Roberts, what is the next entry with reference to this improvement?

A. The next will be the proof of publication, with the passage of the resolution, page 243.

Q. Read that.

Judge HACKNEY: I want to object, may the Court, please, that the record of the council is not competent to prove the notice
80 that was given.

Q. Is there a sworn copy of the notice there—the proof?

A. Yes sir.

Senator GIFFORD: That is what we are offering, your Honor, to prove the record on that subject.

Judge HACKNEY: May the Court please, I want to enlarge my objection. I object not only because the record of the Council is not competent proof of notice, but that the affidavit from which the witness proposes to read is not competent evidence of the notice.

The COURT: I will let this be read, and I will strike it out if I change my mind and conclude that it is not competent.

To which ruling of the Court the defendant, by counsel, at the time excepted.

The said proof of publication was admitted and read in evidence, the same being in the words and figures following, to-wit:

"Notice for the Improvement of Main Street in the City of Lebanon, Indiana.

At a regular session of the Common Council of Lebanon held in the Council Chamber of said City on January 27th, 1896 a declaratory resolution was unanimously passed for the construction of a brick street and sidewalks of cement, asphaltum or brick, in
81 said City, as follows, to-wit:

From the west corporation line on said Main Street east to Lebanon street, a distance of two thousand, five hundred and fifty (2,550) feet.

Therefore notice is hereby given that all persons interested in the proposed improvement of said street may appear before the Common Council of said City in the Council Chamber of the Mayor's Office in said City on the 24th day of February, 1896, at seven o'clock P. M., and make objections if any they have to the proposed construction of the aforesaid Main Street.

Voting Aye on the resolution, Councilmen Busby, E. D. Busby, G. W. Hooton, Osborne and Spickelmire.

By order of the common council.

Attest:

WILL A. TULL,
City Clerk.

Lebanon, Indiana, January 30, '96."

Judge HACKNEY: That I understand is read from what purports to be a clipping from a newspaper.

The WITNESS: Yes sir.

Senator GIFFORD: But it is fastened in. It is made a part of the record.

The WITNESS: Yes sir.

Q. Now, what is on the back of the notice?

A. (Reading:)

"Proof of Publication.

STATE OF INDIANA, *Boone County, ss:*

S. N. Cragum swears that he is the publisher of the Lebanon Patriot, a weekly newspaper of general circulation, published at

Lebanon, Boone County, Indiana, and that the annexed notice was published in said paper on the 30th day of January, 1896 and each week thereafter for two weeks in succession.

S. N. CRAGUM.

82 Subscribed and sworn to before me this 17th day of February, 1896.

R. C. GARRETT, *Mayor.*

Printers fee, three and a half square, three weeks, $7.00."

By the COURT:

Q. Is there any entry there at all about that notice?

A. No sir.

Q. The Council took no action? Is there not any record of any action taken on the notice?

A. I do not see any. Hold on a minue. You mean the record that is made from that?

Q. Yes.

A. Yes, here it is:

(Reading:) "The Proof of Publication for brick street on West Washington street was read and remonstrance was filed and read, and the remonstrance was referred to the Committee of Streets and Alleys."

Judge HACKNEY: May the Court please, I would like to enlarge my objection still further, that the notice read does not name any property owner, and does not include by name or description of property this defendant.

The COURT: All right. Let the record show that objection, and that it is overruled for the present.

To which ruling of the Court the defendant, by counsel, at the the time excepted.

83 The COURT: I think I will let that stay in with the understanding, that I spoke of, that if it is not sufficiently proven, making the proper proof showing that the notice was actually published—I will let the contents of that paper stay in with the understanding that you expect to make the proper proof, if it is not already sufficient.

Senator GIFFORD: Yes your Honor, I will send and get the editor and have him swear to it, when he comes from Lebanon. You may know he will swear to it.

Q. Now, Mr. Roberts, what is the next entry in reference to this improvement?

A. Page 290.

Q. Read it.

A. (Reading:) "Councilman Osborne submitted an ordinance for brick street. After being read Councilman Hooton moved that the rules be suspended and the ordinance placed on its passage, but after suspension of the rules and three votes taken on the passage,

the ordinance was withdrawn to be taken up Thursday night, April 16th."

Q. Read your next entry.

A. (Reading:) "Councilman Hooton moved that when we adjourn we do so to meet Thursday evening at seven-thirty o'clock P. M.

Q. Now, the next entry.

A. Page 301 (Reading): "Councilman Hooton moved that we now take up the ordinance on West Main Street. Motion carried.

84 Councilman Osborne offered the following, towit:

Ordinance for the improvement of Main Street from the west corporation line to Lebanon street.

SECTION 1. Be it ordained by the Common Council of the City of Lebanon, Indiana (two-thirds of the members thereof concurring) that said Common Council orders the improvement of Main Street in said City from the west corporation line thereof, east to Lebanon street, a distance of two thousand five hundred and fifty feet (being more than one full square) by grading the roadbed thereof to a width of twenty-six feet from the west corporation line to the west side of West street and from the west side of West street to Lebanon street to a width of forty-two feet, all to an average depth of seventeen inches; by preparing the roadbed with six inches of broken stone and two inches of sand well rolled; by placing upon said broken stone foundation a hard burned paving brick set in an upright position and at right angles with the curbstone, said brick to be burned especially for street paving purposes; upon the surface so completed there is to be a filling of cement flush with the top or surface of the roadbed.

The sidewalk to be constructed of the best quality of vitrified sidewalk paving brick, set on a bed of six inches of sand and three inches of grout, to be six feet wide from the west corporation line to the west side of West street, and from the west side of West street to the west side of Lebanon street twelve feet wide; the sidewalk to be six feet wide is to be set back from the property line one and one-half feet; the sidewalk twelve feet wide to extend from the property line to the inside of the curbing.

85 There is to be constructed on the line of work so many catch basins as the engineer may direct, to have a circular radius of three feet, six inches from inside brick line to inside brick line; the circular caps to be on a radius of four feet, and the mouth of the inlet to be two feet and six inches wide, the whole to be built with the best quality of Portland cement mixed with mortar and to be placed at such points as the engineer may direct; all of which is more fully set out in the detailed specifications, plans and drawings now on file in the office of the City Civil Engineer of said City.

SECTION 2. The costs of said improvement shall be assessed per lineal front foot as provided in the Act of the General Assembly of the State of Indiana, approved March 8, 1889, and the amendments thereto (known as the Barrett Law) and street improvement certificates will be issued in payment of all assessments for which the

proper application shall be made, and contractors will be required to accept said assessments and certificates in payment of the contract price.

SECTION 3. Said improvement shall be completed by the 1st day of October, 1896, in accordance with the declaratory resolution, this ordinance and the plans, specifications and detailed drawings as recorded in the record of street improvement specifications from page 1 to page 29, and the City Civil Engineer is hereby directed to set the necessary grade stakes for said improvement and to give three weeks' notice by publication that sealed proposals for the construction of said improvement will be received at the Council Chamber of said City at seven-thirty o'clock P. M. on the 18th day of May, 1896.

Each bidder must bid on said work by the lineal foot and
86 no bid will be considered unless accompanied by a certified check in the sum of one thousand dollars made payable to the order of said City and to become the absolute property in the event that the bidder be awarded the contract and he fails for the period of ten days after the same is awarded to him to enter into written contract and give bond for its faithful performance in double the amount of the total price with sureties to be approved by this Common Council, one of whom must be a resident of Boone county, Indiana. Each bidder must submit with his bid a verified statement of the extent of his experience in constructing such improvement and also give the names of five reliable persons as reference of whom the Council may make inquiry before awarding the contract, and the Council reserves ten days for the investigation of bids before awarding the contract and also reserves the right to reject any and all bids. No bid will be considered unless the bidder shall have fully complied with all the requirements of the detailed specifications as recorded in the record of street improvement specifications from page 1 to page 29. No work shall be regarded as accepted until the Council makes formal acceptance of the same. The contractor shall at all times comply with the instructions of the City's agent or engineer superintending said work.

Any misunderstanding that may arise as to the construction of the declaratory resolution, this ordinance, the contract for said work, or the plans and specifications and detailed drawings shall be referred to the superintendent of said work and the City Attorney, and their decision of the controverted question shall be final and binding upon both parties.

87 SECTION 5. This ordinance shall be in full force and effect from and after its passage.

WILL E. OSBORNE,
Councilman.

Councilman Hooton moved that the rules be suspended and the ordinance placed on its passage. Roll Call on suspension resulted as follows: Councilmen Busby, Hooton, Osborne and Spickelmire voting aye. Voting no, none. The Mayor declared the rules suspended. Roll Call on passage, Busby, Hooton, Osborne and Spickelmire voting aye. Voting no, none. Two-thirds of the full Council

present and voting aye, voting no, none, the Mayor declared the ordinance passed and ordained and established this 16th day of April, 1896.

R. C. GARRETT, *Mayor.*

Attest:
WILL A. TULL,
City Clerk."

Q. Now, refer to your record for the second notice to contractors. Is that your next entry?

A. Yes sir.

Q. Refer to the second notice. Omit the first notice as there was no action taken on it.

The COURT: This is the notice that Judge Hackney, objected a while ago that the defendant was not named.

Judge HACKNEY: The defendant nor none of the rest of the property holders have been named in any of these notices.

Senator GIFFORD: No notice has so far described any property or any individual.

88 The WITNESS: Page 370 is the next.

Judge HACKNEY: May the Court please, I want to object to the introduction of this notice. It purports to be a clipping from some newspaper, is accompanied by an affidavit concerning the publication. That is not competent evidence of the fact of publication, and the record which accompanies it is not competent proof of publication or notice of a proposed letting.

The Court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

Senator GIFFORD: Proceed and read it, Mr. Roberts, with the understanding that if it is not sufficient we will bring the editor here.

The WITNESS (Reading):

Notice to Contractors.

Notice is hereby given that in pursuance to a special ordinance and order of the Common Council of the City of Lebanon, Indiana, passed April 16, 1896, sealed bids will be received up to 7:30 o'clock P. M. on Thursday, June 18th, 1896, At the Council Chamber of said City of Lebanon, for the improvement of Main street in said City from the west corporation line to Lebanon street, as set out in the declaratory resolution, the special ordinance, and more fully in the plans and specifications on file in the City Engineer's office, the special ordinance being as follows:

Ordinance for the Improvement of Main Street from the West Corporation Line to Lebanon Street.

89 SECTION 1. Be it ordained by the Common Council of the City of Lebanon, Indiana, (two-thirds of the members thereof concurring), that said Common Council orders the im-

provement of Main Street in said City from the west corporation line thereof, east to Lebanon Street, a distance of twenty-five hundred and fifty feet (being more than one full square) by grading the roadbed thereof to a width of twenty-six feet from the west corporation line to the west side of West street, and from the west side of West street to Lebanon street, to a width of forty-two feet, all to an average depth of seventeen inches; by preparing the roadbed with six inches of broken stone and two inches of sand well rolled; by placing upon said broken stone foundation a hard burned paving brick set in an upright position and at right angles with the curbstone, said brick to be burned especially for street paving purposes; upon the surface so completed there is to be a filling of cement flush with the top or surface of the roadbed. The sidewalk to be constructed of the best quality of vitrified sidewalk paving block set on a bed of six inches of sand and three inches of graut, to be six feet wide from the west corporation line to the west side of West street, and from the west side of West street to the west side of Lebanon street, twelve feet wide; the sidewalk to be six feet wide is to set back from the property line one and one-half feet; the sidewalk twelve feet wide to extend from the property line to the inside of the curbing.

There is to be constructed on the line of work so many catch basins as the engineer may direct to have a circular radius of three feet six inches from inside brick line to inside brick line; the
90 circular caps to be cut on a radius of four feet, and the mouth of the inlet to be two feet and six inches wide, the whole to be built with the best quality of Portland cement mixed with mortar and to be placed at such points as the engineer may direct, all of which is more fully set out in the detailed specifications, plans and drawings now on file in the office of the City Civil Engineer of said City.

SECTION 2. The costs of said improvement shall be assessed per lineal front foot as provided in the Act of the General Assembly of the State of Indiana, approved March 8th, 1889, and the amendments thereto (known as the Barrett Law), and street improvement certificates will be issued in payment of all assessments for which the proper applications shall be made and the contractors will be required to accept said assessments and certificates in payment of the contract price.

SECTION 3. Said improvement shall be completed by the first day of October, 1896, in accordance with the declaratory resolution, this ordinance, and the plans, specifications and detailed drawings as recorded in the Record of Street Improvement Specifications from page 1 to page 29, and the City Civil Engineer is hereby directed to set the necessary grade stakes for said improvement, and to give three weeks' notice by publication, that sealed proposals for the construction of said improvement will be received at the Council Chamber of said City at seven-thirty o'clock P. M. on the 18th day of June, 1896.

SECTION 4. Each bidder must bid on said work by the lineal foot, and no bid will be considered unless accompanied by a certified

check in the sum of one thousand dollars, made payable to the order of said City, and to become the absolute property, in the event
91 that the bidder be awarded the contract and he fails for the period of ten days after the same is awarded to him, to enter into a written contract and give bond for its faithful performance in double the amount of total contract price with sureties to be approved by this Common Councel, one of whom must be a resident of Boone County, Indiana. Each bidder must submit with his bid a verified statement of the extent of his experience in constructing such improvements, and also give the names of five reliable persons as references, of whom the Council may make inquiry before awarding the contract, and the Council reserves ten days for the investigation of bids before awarding the contract, and also reserves the right to reject any and all bids. No bid will be considered unless the bidder shall have fully complied with all the requirements of the detailed specifications as recorded in the Record of Street Improvement Specifications, from page 1 to page 29. No work shall be regarded as accepted until this Council makes formal acceptance of the same. The contractor shall at all times comply with the instructions of the City's agent or engineer superintending said work. Any misunderstanding that may arise as to the construction of the declaratory resolution, this ordinance, the contract for said work or the plans, specifications and detailed drawings, shall be referred to the superintendent of said work and the City Attorney, and their decision of the controverted question shall be final and binding upon both parties.

SECTION 5. This ordinance shall be in full force and effect from and after its passage.

Ordained and established this 16th day of April, 1896.

92 R. C. GARRETT, *Mayor.*

Attest:
WILL A. TULL,
City Clerk.

Said bids to be opened at the said time and place specified above, and the right to reject any and all bids *is* reserved by the Council.

E. D. JAMES,
City Engineer.

Lebanon, Ind., May 28, '96—15w3."

STATE OF INDIANA, *Boone County, ss:*

S. N. Cragum swears that he is the publisher of the Lebanon Patriot, a weekly newspaper of general circulation, published at Lebanon, Boone County, Indiana, and that the annexed notice was published in said paper on the 28th day of May, 1896, and each week thereafter for two weeks in succession.

S. N. CRAGUM.

Subscribed and sworn to before me, this 18th day of June, 1896.
R. C. GARRETT, *Mayor.*"

Q. Is there any record there made by the Council in reference to that?

A. Yes sir. (Reading:)

"Councilman Busby moved that the bids for the brick street improvement of West Main Street be opened.

Motion carried.

The bids were opened after the reading of the proof of publication for the brick street improvement, and Councilman Busby
93 moved that the bids be held and considered until next Monday night.

Motion carried."

Q. Read your next entry.

A. Page 378 (Reading):

"The Mayor stated that this meeting was for the purpose of acting upon the bids open for the construction of West Main Street (brick street) and that the property owners on Main Street had been invited and asked to come before the Council and present their cases to the Council, no person seeming disposed to offer an objection, Councilman Hooton moved that the rules be suspended and that the Council take up such matter that may come before the Council.

Motion carried.

After the reading of the bids and which are as follows, to-wit:

Waugh, Foster & Co. 26 ft. Roadbed, Poston Block	$4.50
" " " 42 " " " "	7.20
Curbing with cement curb, both sides, per lineal foot	.76
Curbing with stratified, both sides, per lineal foot	1.16
Curbing with oolitic, both sides, per lineal foot	1.04
Lawns and six foot walks, vitrified brick, both sides, per lineal foot	1.28
Lawns and twelve foot walks, vitrified brick, both sides, per lineal foot	2.56
Lawns and six foot walks, cement, both sides, per lineal foot	1.80
Lawns and twelve foot walks, cement, both sides, per lineal foot	3.60
94 Catch basins	22.00

Eight per cent. on assessments on five per cent. bonds.

Daniel J. Dalton.

26 ft. Roadway, Poston Block, per foot	4.03
" " " Terre Haute " " "	4.21
" " " Buckeye " " "	4.20
" " " Brazil " " "	4.17
Walks six foot wide Wabash Clay, both sides	1.45
Buckeye brick for walk, both sides	1.50
Epperson's shale block, both sides	1.30
Curb, stratified limestone " "	.95
" oolitic " "	.85

Catch basins, each	20.20
42 ft. Roadway, Poston block, per foot	6.25
" " " Buckeye " " "	6.55
" " " Terre Haute " "	6.50
" " " Brazil " "	6.30
Walks, twelve foot wide, Wabash Clay, both sides	2.90
" " " " Buckeye Block " "	3.00
" " " " Brazil " " "	2.60
Curb, stratified limestone, both sides	.95
" oolitic " "	.85
Cement per square foot	.12¼

If the Council reserves ten per cent. add to this bid seven per cent., for maintenance for five years, or I will file an indemnifying bond for three thousand dollars to guaranty for five years at the face of this bid.

Very respectfully submitted,

DANIEL J. DALTON."
J. W. FRY & COMPANY."

95 Senator GIFFORD: Just go right to the bid of Porter, Bowlin and Hadley. We don't care about the others.

The WITNESS: The next is the bid of Porter, Bowlin & Hadley. It is at page 380.

Senator GIFFORD: Read that.

The WITNESS: (Reading):

"Porter, Bowlin & Hadley.

26 ft. Poston or Veedersburg Block, per lineal ft	$4.80
" " Canton or Buckeye " " " "	5.33
42 " Poston or Veedersburg " " " "	8.10
" " Canton or Buckeye " " " "	9.90
Curb, stratified limestone, both sides	1.11
Sidewalk, six ft., Terre Haute, both sides	1.70
" twelve ft. " " " "	2.40
" six " Cement " "	1.90
" twelve " " " "	3.80
Catch basins, each	13.00

The WITNESS: Then comes some other bids which I will not read. Then (Reading):

"After the reading of the bids the Mayor gave all persons interested in the Main street improvement, an opportunity to make any remarks that they desired to make in the matter, this being the second time that the opportunity had been given this evening to persons to object. After a wait of from three to five minutes, and no person raising a voice against the street, Councilman Hooton moved that as Porter, Bowlin & Hadley were the best bidders, having complied with the advertisements in all respects, that they be awarded the contract.

Motion carried."

ıe WITNESS: Now then, on pages 380, 381 and 382 (Reading):

"The following is the bid, and is as follows, to-wit:

LEBANON, INDIANA, *May 18th*, 1896.

he Common Council of the City of Lebanon, Indiana:

ıe undersigned hereby agrees to improve West Main street in city, from the west corporation line thereof, east to Lebanon t, a distance of two thousand five hundred and fifty feet, more ɜss, by grading the road bed thereof to a width of twenty-six from the west corporation line to the west side of West street, from the west side of West street to Lebanon street to a width orty-two feet, all to an average depth of seventeen inches; by aring the road bed with six inches of broken stone and two es of sand well rolled; by placing on said broken stone founda- a hard burned paving brick set in an upright position and at t angles with the curbstone, said brick to be burned especially street paving purposes: by placing on the surface so completed lling of cement flush with the top or surface of the roadbed; constructing a sidewalk on each side of said street of the quality of vitrified sidewalk paving block set on a bed of six ıes of sand, said sidewalk to be six feet wide from the west cor- ıtion line to the west side of West street, and from the west side West street to the west side of Lebanon street, twelve feet wide: sidewalk twelve feet wide to extend from the property line to inside of the curbing, and the sidewalk six feet wide is to be back from the property line one and one half feet. By con- cting on the line of said work so many catch basins as the engi- may direct, the same to have a circular radius of three feet, six inches from inside brick line to inside brick line; the circular caps to be cut on a radius of four feet, and the mouths of the inlet to be two feet and six inches wide, and whole to be built with the best quality of Portland cement e[illegible] with mortar, and to be placed at such points as the engineer [illegible]rect; the brick to be used in the construction of the catch ns to be first class building brick. I will also place on each of the said street curbstones of the kind and quality described he specifications for said improvement and will furnish all ma- ıl and do all the work required by the plans, specifications, and vings for the same. All the material to be used in said work e of the kind and quality provided for in the specifications for same as recorded in the record of street improvement specifica- s of said city from page 1 to page 29.

he undersigned hereby agrees that in the construction of said k he will be bound by each and every provision of said specifica- s, the drawings for said improvement, the declaratory resolu- , and special ordinance, for the same; and the undersigned construct said improvement in accordance therewith at and for following prices, to-wit:

rom the west corporation line to the west side of West street as ows:

The roadbed complete with Poston or Veedersburg paving block, per lineal foot, four dollars and eighty cents ($4.80).

The roadbed complete with Canton or Buckeye paving block per lineal foot five dollars and thirty-five cents ($5.35).

From the west side of West street to Lebanon street, forty-two foot apart,

The roadbed complete with Poston or Veedersburg paving block per lineal foot eight dollars and ten cents ($8.10).

The roadbed complete with Canton or Buckeye paving
98 block, per lineal foot, nine dollars and ninety cents ($9.90).

Curbing, with stratified limestone curbstone, both sides included, per lineal foot, one dollar and eleven cents ($1.11).

Lawns and sidewalks with vitrified brick, both sides included, per lineal foot, Terre Haute sidewalk brick on six foot walk, one dollar and seventy cents ($1.70).

For twelve foot sidewalk, using Terre Haute brick, three dollars and forty cents ($3.40)—($2.40).

Lawns and cement sidewalks of the kind described in the specifications to be built on the written request of the property owners, both sides included, per lineal foot, six foot, a dollar ninety ($1.90).

For twelve foot walk three dollars and eighty cents ($3.80).

All work required to be done in completing said improvement shall be construed to be included in the above propositions.

I will give a deduction of fourteen and five per cent. on all assessments paid cash within thirty days after completion of said improvement.

I will give a deduction from above price of fourteen per cent. for the issuance of street improvement bonds in denominations as nearly one thousand dollars as can be, instead of street improvement certificates.

(Signed) PORTER, BOWLIN & HADLEY.

Below find the names and postoffice addresses of five reliable persons as references.

	P. O. Address.
Bert Frumick	City Engineer Elwood, Indiana.
E. H. Shirk	Cashier Tipton Co. Bank, Tipton.
99 The Union Bank	Tipton Co., Tipton.
R. N. Van Buskirk	City Engineer, Tipton.
R. M. Romack	County Engineer, Tipton.

The above bids includes all work or none.

STATE OF INDIANA, *County of Boone, ss:*

The undersigned, being duly sworn upon his oath says that the persons filing the bid to which this affidavit is attached has had five years' experience in constructing brick streets of this character, and has in said time constructed three to five miles of such improvement.

M. L. BOWLIN.

Subscribed and sworn to before me this 18th day of June, 1896.
[SEAL.] HENRY C. ULEN, JR.,
Notary Public.

The roll call was ordered on the bid, and the same is as follows, to-wit: Councilman Busby, Brattan, Hooton, Hosford, Reagan and Troutman voting Aye on the question, the Mayor declared as the vote was unanimous, none voting No, that the contract would be awarded to Porter, Bowlin & Hadley, of Tipton, Indiana, and that they would be required to sign contract and give bond as required by the Common Council of the City of Lebanon for the construction of brick street on West Main street, in said City."

The WITNESS: The next we have is the contract of Porter, Bowlin & Hadley, on page 385 of the record as follows (Reading):

"COUNCIL CHAMBER, CITY OF LEBANON.

Council met on the above petition of Councilmen Hooton, Bratton, Hosford and call of the Mayor, with Mayor Garrett
100 and Councilmen Busby, Bratton, Hooton, Reagan and Troutman present.

Councilman Hooton moved that we proceed to transact the business that may come before the Council with reference to the contract and bond of Porter, Bowlin & Hadley.

Motion carried.

The contract and bond of Porter, Bowlin & Hadley was submitted and read and is as follows, to-wit:

LEBANON, INDIANA, *June 24th*, 1896.

This agreement made and entered into this 24th day of June, 1896 by and between the City of Lebanon, Indiana, first party, and Porter, Bowlin & Hadley, (composed of Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley), second party, Witnesseth, That for and in consideration of the payments and covenants hereinafter mentioned, and under the penalty expressed in a bond bearing even date herewith and hereunto annexed, the second party hereby agrees to furnish all material, tools and labor necessary or incidental to complete the work contemplated by this agreement, to the satisfaction and approval of the superintending engineer and the acceptance of the City Council of the City of Lebanon, Indiana, and to complete the improvement of West Main street in said City, from the west corporation line thereof, east to Lebanon street (a distance of two thousand, five hundred and fifty feet more or less) by the first day of October, 1896, at and for the following prices, to-wit: by grading the roadbed thereof to a width of twenty six feet from the west corporation line to the west side of West street, to an average depth of seventeen inches; by preparing the roadbed with six inches of broken stone and two inches of sand well rolled: by placing on said broken stone foundation hard burned Poston block paving brick, set in upright
101 position and at right angles with the curbstone, said brick to be burned especially for street paving purposes and to conform

in every respect with the specifications for said improvement; and by placing on the surface so completed a filling of cement flush with the top or surface of the roadbed, said roadbed to be fully completed for the sum of four dollars and eighty cents ($4.80) per lineal foot: by curbing both sides of said street with stratified limestone of the kind and quality described in the specifications for said street, for the sum of one dollar and eleven cents ($1.LL) per lineal foot, both sides included, or fifty-five and one-half cents ($.55½) per lineal foot on each side; or by curbing both sides of said street with oolitic curbstone of the size described in the specifications for the price of one dollar and one cent ($1.01) per lineal foot, or fifty and one-half cents ($.50½) per lineal foot on each side.

The Common Council of the City of Lebanon reserves the option for a period of fifteen days to determine which kind of curbstone will be used:

By constructing lawns and sidewalks on both sides of said street of the kind and sizes described in the specifications, the sidewalks to be constructed of Terre Haute sidewalk brick for the sum of one dollar and seventy cents per lineal foot ($1.70), both sides included, or eighty-five (.85) cents per lineal foot on each side; or by completing said lawns and constructing cement sidewalk of the kind described in the specifications, to be built on the written request of the property owners, for one dollar and ninety ($1.90) cents per lineal foot, both sides included, or ninety-five (.95) cents per lineal foot on each side.

By grading the roadbed to a depth of forty-two feet from the west side of West street to Lebanon street to an average depth of
102 seventeen inches; by preparing the road bed with six inches broken stone and two inches of sand, well rolled; and by placing on said broken stone foundation hard burned Poston block paving brick set in an upright position and at right angles with the curbstone, said brick to be burned especially for street paving purposes and to conform in every respect with the specifications for said improvement, and by placing on the surface so completed a fil-ing of cement flush with the top or surface of the roadbed, said roadbed to be fully completed for the sum of eight dollars and ten cents ($8.10) per lineal foot; by curbing both sides of said street with stratified limestone of the kind and quality described in the specifications for said street for the sum of one dollar and eleven cents ($1.11) per lineal foot, both sides included, or fifty-five and one-half cents (.55½) per lineal foot on each side; or by curbing both sides of said street with oolitic curbstone of the size described in the specifications, for the sum of one dollar and one cent ($1.01) per lineal foot, both sides included, or fifty and one-half (.50½) cents per lineal foot on each side, the Common Council of the City of Lebanon reserves the option for a period of fifteen days to determine which kind of curbstone will be used: By constructing sidewalks on both sides of said portion of said street twelve feet wide of vitrified Terre Haute sidewalk brick for the sum of three dollars and forty ($3.40) cents per lineal foot, both sides included, or one dollar and seventy ($1.70) cents on each side, or by constructing cement sidewalks of

the kind described in the specifications for said portion of said street, to be built on the written request of the property owner, for the sum of three dollars and eighty ($3.80) cents per lineal foot, both
103 sides included, or one dollar and ninety ($1.90) cents per lineal foot on each side.

And the second party agrees to construct as many catch basins of the kind described in the specifications as the superintendent may order for thirteen dollars, ($13.00) each.

All work required to be done in fully completing said improvement shall be construed to be included in the contract and the plans, specifications and detailed drawings for said improvement and each provision therein as recorded in the record of street improvement specifications from page one to page twenty-nine, inclusive, of said City, are made a part of this contract as fully and completely as if the same was set out specifically herein, and the declaratory resolution and special ordinance for said improvement are each made a part of this contract the same as if each was fully set out herein.

The said second party further agrees that he will give a deduction of fourteen (14) per cent., and then a deduction of five per cent. from the prices herein set out on all assessments paid cash within thirty days after the completion of said improvement, and that he will give a deduction of fourteen (14) per cent. from said prices for the issuance of street improvement bonds in denominations of as nearly one thousand dollars as can be instead of street improvement certificates; and that said party of the second part will give a deduction of fourteen (14) per cent. from the assessment against said City upon the issuance of a City order therefor, and an additional deduction of five (5) per cent. therefrom on remainder if said order be paid cash.

The said second party further agrees to at all times comply with the instructions of the City's agent or engineer superintending said work, and no work shall be regarded as accepted until the
104 Common Council of the City of Lebanon makes formal acceptance of the same.

It is further agreed between the parties that any misunderstanding that may arise as to the construction of the declaratory resolution, special ordinance, the contract, plans, specifications or detailed drawings for said work shall be referred to the superintendent of said work and the city attorney and their decision of the controverted question shall be final and binding upon both parties.

And it is further agreed between the parties that no act of the superintendent in charge of said work, the City Council of said City or any other officer thereof, shall in any way increase the contract price or make the City of Lebanon liable for extra work or extra material of any kind or character, but the price herein set out shall include all material and all work to be done upon said street by the second party in the improvement of the same.

The second party further agrees to prohibit intemperance, disorderly conduct and incompetency among his employees on said work, and that he will discharge all such offenders immediately upon the order of the superintendent.

The second party further agrees that he will hold the said city of

Lebanon harmless from all suits, liens, or actions by reason of any failure, neglect, inadvertence, oversight or incompetence on his part relative to the work herein contemplated, and that he will exercise proper skill in the prosecution of said work, and that he will carefully guard and protect all dangerous excavations and other places in said street and will use due care and precaution to prevent injury to person or property, and to omit no reasonable precaution that will tend to the security of person or property, and will hold said city harmless from the payment of all the damages that may result to either person or property by reason of any such neglect on
105 the part of the second party.

It is further agreed that, if said work shall not be finished by the time specified herein, then the contract shall be void and of no effect in law, and the first party shall have the privilege and option of forfeiting this contract and reletting the same to other contractors, and the parties of the second part shall be liable for all damages that may accrue by said failure to perform said work according to this contract, and unless said work shall be done by the time specified herein, the party of the second part shall not recover for any work done under this contract, unless the time for the completion of the same shall have been extended by the Common Council of said City as authorized by the specifications for said improvement.

It is further agreed that, when said work is completed and accepted, the cost and expenses thereof shall be assessed upon the lots and parcels of land abutting thereon in accordance with the provisions of the statute now in force on said subject, and the assessment so made shall be accepted by the second party in full discharge of the consideration in this contract.

Witness the signature of the parties this 24th day of June, 1896.

First party by

R. C. GARRETT, *Mayor.*
WILLIAM A. TULL, *City Clerk.*
PORTER, BOWLIN & HADLEY,
Second Party."

Q. Now, Mr. Roberts, what is the next entry?
A. The next is the bond. That follows on page 391.
Q. Read that.
A. (Reading:)

106 "Know all men by these presents, That we, Robert L. Porter, Melvin L. Bowlin, Chester G. Hadley, principals, and J. C. Urmstom, S. G. Young, T. M. Nance, J. A. Gleason, John H. Perkins and D. W. Foster, sureties, are held and firmly bound to the City of Lebanon, Indiana, in the sum of thirty-four thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of June, 1896.

The condition of this obligation is such that if the said Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, as the firm of Porter, Bowlin & Hadley, shall well and truly keep and perform all the terms and provisions of a contract with the city of Lebanon,

Indiana, entered into by them with said City on the 24th day of June, 1896, for the improvement of West Main street in said City from the west corporation line thereof east of Lebanon street, and shall indemnify and save harmless the said City as therein stipulated, then this obligation shall be void; otherwise it shall remain in full force and effect.

Witness our hands and seals this 24th day of June 1896.

PORTER, BOWLIN & HADLEY. [SEAL.]
M. L. BOWLIN. [SEAL.]
C. G. HADLEY. [SEAL.]
R. L. PORTER. [SEAL.]
J. C. URMSTOM. [SEAL.]
S. G. YOUNG. [SEAL.]
T. M. NANCE. [SEAL.]
J. A. GLEASON. [SEAL.]
JOHN H. PERKINS. [SEAL.]
D. W. FOSTER. [SEAL.]

107 TIPTON, INDIANA, *June 27th.*

This is to certify that we consider the bond of Porter, Bowlin & Hadley for thirty-five thousand dollars signed by Bowlin, Hadley & Porter, Urmston, Young, Nance and Gleason as good for that amount.

E. H. SHIRK, *Cas.*

Council- Hooton moved that the contract and bond of Porter, Bowlin & Hadley for the construction of West Main street be accepted and approved.

Motion carried."

The WITNESS: That acceptance of the contract and bond is on page 392 of the record.

Q. What is your next entry?
A. The next entry is on page 483.
Q. What is that concerning?
A. (Reading:)

"Officers' Report.

H. S. Bosler, Engineer for the West Main Street improvement, submitted the following, to-wit:

LEBANON, INDIANA, *Dec.* 14, 1896.

To the Hon. Mayor and Common Council, Lebanon, Indiana.

GENTLEMEN: I respectfully call your attention to the fact that West Main street from west building line of Lebanon street to west corporation line has been completed in accordance with the specification for same.

Respectfully submitted,

H. S. BOSLER, *Engineer.*
E. D. JAMES,
City Engineer."

Q. What is your next entry?
A. The next entry on the same page, page 483, is the resolution accepting the West Main street improvement and referring it
108 to the City Civil Engineer and ordering him to submit final estimate and report.
Q. Read it.
A. (Reading:)

"Resolution accepting West Main street, to-wit: Be it resolved by the Common Council of Lebanon, Indiana, That the report of the City Civil Engineer accepting West Main street, from the west corporation line of said City to the west side of Lebanon street as improved and fully completed by Porter, Bowlin & Hadley in accordance with the contract therefor, be and the same is hereby approved by this Common Council, and that this Common Council hereby accepts said improvement as fully completed according to the said contract, and that the City Civil Engineer of said city be and he is hereby required to make and file with this Common Council a final estimate of the total cost of said improvement, in which he shall report the following facts:

First, the total cost of said improvement.

Second, the average cost per running foot of the whole length of that part of said street so improved.

Third, the name of each property owner on that part of the street so improved.

Fourth, the number of front feet owned by the respective property owners on that part of said street so improved.

Fifth, the amount of such cost for improvement due upon each lot or parcel of ground bordering on said street, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively from the west corporation line of said City to the west side of West street, and by multi-
109 plying the average cost price per running front foot by the number of running front feet of the several lots and parcels of ground respectively, from the west side of West street to the west side of Lebanon street.

Sixth, the full description together with the owner's name of each lot or parcel of ground bordering on the part of said street so improved.

(Signed) E. D. BUSBY.

Councilman Bratton moved that the rules be suspended and the resolution placed on its passage. Roll call on suspension of rules, Busby, Bratton, Hooton, Hosford, Reagan and Troutman voting Aye; voting No, none. The Mayor declared the rules suspended.

Roll call on passage resulted as follows, to-wit: Busby, Bratton, Hooton, Hosford, Reagan and Troutman voting Aye. Voting No, none. Two-thirds of the full membership of the Council present and voting Aye, voting no, none, the Mayor declared the resolution passed this 14th day of December, 1896.

R. C. GARRETT, *Mayor.*

Attest:
WILL A. TULL, *City Clerk.*

Q. What is your next entry?
A. On page 485.
Q. What is that?
A. The report of E. D. James, City Engineer.
Q. Read it.
A. (Reading:)

"The following report was submitted as follows, to-wit:

LEBANON, INDIANA, *December* 14, 1896.

To the Hon. Mayor and Common Council, Lebanon, Indiana.

GENTLEMEN: I herewith submit for your approval a first
110 and final estimate in favor of Porter, Bowlin & Hadley contractors for the improvement of West Main street from west building line of Lebanon street to west corporation line, in accordance with your orders.

Respectfully submitted,

H. S. BOSLER, *Engineer.*
E. D. JAMES,
City Engineer."

The WITNESS: Now, the estimate submitted is not set out at this point, the estimate referred to in the communication from the engineers.

Q. That is the report of the officers?
A. Yes sir, on page 485.
Q. Then what is your next entry?
A. The next entry is the record of the resolution referring the final estimate report of the engineers to the Committee on Streets and Alleys, being the resolution that follows that report.
Q. Read it.
A. (Reading:)

"Resolution referring estimate to Committee:

Be it resolved by the Common Council of the City of Lebanon, Indiana, that the final estimate report of the City Civil Engineer of said City of the total cost of the improvement of West Main street therein, from the west corporation line of said City to the west side of Lebanon street, be and the same is hereby referred to the Committee of this Common Council on streets and alleys, which Committee is hereby appointed to hear said report, and which Committee is hereby directed to meet at the Council Chamber of said City on the 14th day of January, 1897, at ten o'clock A. M. that any person feeling aggrieved by said report shall have the right
111 to appear before said Committee at said time and place; and the City Clerk is hereby directed to give two weeks' notice in a newspaper printed and published in said City of the time and place when and where a hearing can be had upon said report.

J. B. BRATTON, *Councilman.*

Councilman Busby moved that the rules be suspended and the resolution be placed on its passage. Roll call on suspension was as

follows: Councilman Busby, Bratton, Hooton, Hosford, Reagan and Troutman voting aye; voting no, none. The Mayor declared the rules suspended. Roll call on passage resulted as follows: Busby, Bratton, Hooton, Hosford, Reagan, and Troutman voting aye; voting no, none. Two-thirds of the full council present and voting aye, voting no, none, the Mayor declared the resolution passed this 14th day of December, 1896.

Attest:

WILLIAM A. TULL,
City Clerk."

Q. What page is that?

A. That is the same resolution that we are talking about, page 485.

Q. What is the next entry?

A. The proof of publication and notice to property holders of proposed assessment, page 496.

Whereupon the hour of twelve o'clock having arrived the Court took recess until two o'clock P. M.

2 O'CLOCK P. M.

Court met pursuant to adjournment.

Present, the same as before recess.

The hearing of the evidence was resumed.

112 R. W. ROBERTS, witness for plaintiff:

Examination in chief (resumed).

Questions by Senator GIFFORD:

Q. I believe the last entry you had was on page 496. You may turn to page 496 of the record. What entry have you there?

A. We were on the proof of publication when we adjourned.

Q. You may read that.

Judge HACKNEY: May the Court please the defendant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company objects for the reason that the affidavit proposed to be read is not competent evidence of notice—the record of the Council is not competent evidence of notice. The proposed evidence is apparently an extract from some newspaper and does not name the defendant in this case among the interested parties, nor describe the property against which the lien herein is sought to be enforced.

The Court overruled the objection; to which ruling of the Court the defendant, by counsel, at the time excepted.

A. (Reading:)

"*Notice of Main Street Assessment.*

LEBANON, INDIANA, *December* 15, 1896.

Notice is hereby given that on the 4th day of January 1897, at ten o'clock A. M. in the Council Chamber of the City of Lebanon,

Indiana, in the Mayor's office in said City before the Committee on streets and Alleys of the Common Council a hearing will be had on the final estimate as submitted by H. S. Bosler (Consulting and Constructing Engineer for the Common Council of the City of Lebanon, Indiana) on the 14th day of December, 1896, of the
113 cost of constructing brick roadway, curbs, and sidewalks on West Main street from the west side of Lebanon street to the west corporation line in the City of Lebanon, Indiana, pursuant to special ordinance for the improvement of said part of said street, and that at the same time and place a hearing will be had by said Committee on the said Engineer's final estimate report.

All persons interested or aggrieved are hereby notified of the time and place when and where said estimate will be considered, and this is your notice and you are hereby notified to appear and make objections if any, to said final estimate report.

By order of the Common Council.

Attest:

WILL A. TULL,
City Clerk."

By the COURT:

Q. Is there any endorsement on that?
A. (Reading:)

"*Proof of Publication.*

STATE OF INDIANA, *Boone County, ss:*

S. N. Cragum swears that he is the publisher of the Lebanon Patriot, a weekly newspaper of general circulation, published at Lebanon, Boone county, Indiana, and that the annexed notice was published in said paper on the 17th day of December, and each week thereafter for one week in succession.

S. N. CRAGUM.

Subscribed and sworn to before me this 4th day of January 1897.

HARRIE LIMPUS, [SEAL.]
Notary Public.

114 Q. Is there any further record on this subject?
A. Yes, sir, there is the Streets and Alleys Committee Report, on pages 496 and 497.
Q. Read it.
A. (Reading:)

"*Street and Alley Committee Report on West Main Street.*

To the Common Council of the City of Lebanon, Indiana:

The undersigned, members of said Common Council and of the Committee thereof on streets and alleys to which was referred the

final estimate report of the City Civil Engineer in favor of Porter, Bowlin & Hadley for the improvement of West Main street in the city of Lebanon, Indiana, from west corporation line thereof to the west side of Lebanon street, respectfully report that pursuant to the order of this Common Council and notice thereof given that we met at the Council Chamber in said City at ten o'clock A. M. on the 4th day of January, 1897, and heard all objections and suggestions that any person interested in said improvement desired to make, and we further report that we found $2.71 too much included in the estimate against said city on the alley between Lebanon street and West street; that the total cost of catch basins was estimated against the city when it should have been included in the total cost and pro rated among the property owners and the City; and that there was included in said estimate about eight hundred dollars for expenses that should not have been included at all; and we further report that we corrected the schedule of said estimates and file herewith and as a part of this report the corrected estimate marked "Exhibit A" and we recommend that said estimate as corrected be approved.

(Signed) REZIN HOSFORD.
115 J. B. BRATTON.
JOHN M. TROUTMAN."

The WITNESS: Now comes the final estimate of the improvement of West Main street, Lebanon, to corporation line. It's a long tabulated statement, covering some pages.

Senator GIFFORD: It is not necessary to read the whole estimate. Just read that part that refers to the property that we are interested in here.

116 Exhibit "A," filed with first and second paragraphs of complaint, being estimate.

(Here follows Exhibit A marked p. 116*a*.)

EXHIBITS

NOT

SUITABLE

FOR

MICRO -

FILMING

NAME OF OWNERS	DESCIPTION OF PROPERTY	NO IN LOT	NO OF BLOCK
John F. Walton John F. Walton			
Mary Kelley	Beginning at intersection of north line of main St. with south R/W of C.C.C. & St. L. Ry. and 584.37" E of W. Line of S.W. ¼ of N.E. ¼ Sec 36 T. 19 N. R. 1 W thence West		

No. of Lot	Block	Addition or Sub Division	No. Feet Front	Price of Paving Per Lineal Foot		No. Lineal Feet of Curbing	Price of Curbing Per Lineal Foot		No. Feet of Sidewalk	Price Per Foot		No. Feet Front	Catch Basin Per Lineal Foot		Amount of Gravel Credit	Amount of Certificate Payment	Amount of Bond Payment with 14 per cent Deducted	Amount of Cash Payment with 4% per cent and then 10% per cent Deducted
			24.00	2.40	57.60	24.00	505	12.12	24.00	85	20.40	24.00	.0282	67	1.03	87.76	77.20	73.24
			72.14	2.40	177.13	72.14	505	36.43	72.14	85	61.31	72.14	.0282	2.03	3.12	272.98	235.46	223.69
			157.37	2.40	377.69	157.37	505	79.47	157.37	85	133.76	157.37	.0282	4.44	6.80	588.56	506.17	480.87

efIcvoa4UacVUpwppwx 1 oh J 1

117 Q. Now what is the next entry you have with reference to this matter?

A. The resolution on page 501 accepting the Committee's Report on the Engineer's final estimate.

Q. Read it.

A. (Reading:)

"*Resolution Accepting Committee's Report on the Engineer's Final Estimate on West Main Street.*

Be it resolved By the Common Council of the City of Lebanon, Indiana, That the Report of the Committee on Streets and Alleys recommending that the final estimate report made by the constructing engineer in favor of Porter, Bowlin & Hadley, contractors for the improvement of West Main street, in said city, from the west corporation line to the West side of Lebanon street be approved as amended by them in the amended schedule filed with said Report, be and the same is hereby adopted and approved by this Common Council, and that the assessments set forth in said amended schedule are hereby approved and confirmed, and that there is hereby assessed against the several lots and parcels of ground as described in said final estimate the several amounts set opposite and assessed against said several lots and parcels of ground respectively and against the city for and on account of said improvement.

(Signed) A. P. W. HOOTEN,
Councilman."

Councilman Hooton moved that the rules be suspended and the resolution be placed on its passage. Roll call on suspension of rules resulted as follows: Councilman Busby, Bratton, Hooton, Hosford, Reagan and Troutman voting Aye. Voting No, none. The Mayor declared the rules suspended. Roll call on passage, Council-
118 men Busby, Bratton, Hooton, Hosford, Reagan and Troutman voting Aye. Voting No, none. Two-thirds of the full membership present and voting Aye, voting No, none, the Mayor declared the resolution adopted and passed this 14th day of January, 1897."

Q. Now what is the next entry?

A. The next entry is on page 495, the indemnity bond given by Porter, Bowlin & Hadley guarant*y*ing the street for five years.

Q. Read it.

A. (Reading:)

"The following bond of Porter, Bowlin & Hadley was submitted and is as follows, to-wit:

Know all men by these presents, That we, Robet L. Porter, Melvin L. Bowlin, Chester G. Hadley, principals, and John Adams, S. F. Cox, R. L. Porter, M. L. Bowlin, S. G. Young, T. M. Nance, D. W. Foster as sureties are held and bound to the State of Indiana for the use and benefits of the City of Lebanon, Indiana, in the

penal sum of two thousand dollars, for the payment of which well and truly to be made we bind ourselves severally and jointly, our heirs, executors, administrators and legal representatives firmly by these presents.

Sealed with our seals and dated this 14th day of January, 1897.

The condition of the above obligation is such that whereas the above bound Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley in the name of Porter, Bowlin & Hadley did on the 24th day of June, 1896 enter into a written contract with *with* the City of Lebanon, Indiana for the improvement of West Main street therein from the west corporation line to the west side of Lebanon street; and whereas it is provided in said contract that the said
119 Porter, Bowlin & Hadley shall for a period of five years from the date of the acceptance of said improvement make good all settlements, defects or damages in the roadbed or any portion of the pavement, or any derangement in the curbing or crossings which may occur within said time.

Now if the said Porter, Bowlin & Hadley shall within ten days after receiving notice in writing by registered letter make good any settlement defect or damage in the roadbed or any portion of the pavement or any derangement in the curbing or crossings of said West Main street between the west corporation line of said city and the west side of Lebanon street, which may occur within five years from the date of the acceptance of said improvement by the Common Council of said City of Lebanon, Indiana, then this obligation shall be void. Otherwise to remain in full force and effect.

Witness our hands and seals this 14th day of January 1897.

(Signed) PORTER, BOWLIN & HADLEY.
JOHN ADAMS.
S. F. COX.
R. L. PORTER.
M. L. BOWLIN.
C. G. HADLEY.
S. G. YOUNG.
T. M. NANCE.
D. W. FOSTER.

Councilman Busby moved the bond be approved and adopted. Motion carried.

Approved this 14th day of January, 1897, by the Common Council, Lebanon, Indiana.

R. C. GARRETT, *Mayor.*

120 Attest:

WILL A. TULL,
City Clerk.

TIPTON, INDIANA, *January* 1, 1897.

City of Lebanon:

This is to certify that we signed the two thousand dollar bond of Porter, Bowlin & Hadley signed by S. G. Young and F. M. Nance as a good bond for that amount.

E. H. SHIRK, *Crs.*"

Q. What is the next entry?

A. The next entry is the ordinance as passed for the issuing of bonds on the streets, by those as filed waivers. That is on page 512.

Q. I believe I will omit that. Now, will you turn to the list of those that signed waivers?

A. They are included in this ordinance.

Senator GIFFORD: Then, if your Honor please, I will ask that that may be introduced in order to show who did and who did not sign waivers. I will offer that.

Judge HACKNEY: It is proposed, your Honor, to introduce the ordinance authorizing the issue of bonds. I object to its introduction or admission for the reason that it is not relative to the issues here, and it does not tend to prove the waiver or the declaration to waive rights under the Barrett law by this defendant or either of the persons whose property it is alleged in the complaint was sold and failed to realize sufficient to pay the assessment against the property, which balance of assessment is now sought to be carried back and charged to the defendant the railroad company.

Senator GIFFORD: It shows, may the Court please, that this
121 party did not sign the waiver. Of course if they had signed the waiver we could not come in and foreclose. It is to show that they did not sign the waiver. For that purpose I think it is competent to show that there is no one either on the second line or third line of lots who did sign the waiver.

The court overruled the objection; to which ruling the defendant, by counsel, at the time excepted.

Q. Now, Mr. Roberts, just read the ordinance as passed for the issuing of the bonds on page 512.

A. (Reading:)

"Councilman Hosford offered the following, to-wit:

Whereas the final estimate and report of the City Civil Engineer upon the improvement in West Main street from the West corporation line to the west side of Lebanon street shows that there is due thereon to Porter, Bowlin & Hadley, the contractors therefor, the sum of seventeen thousand seven hundred and sixty-three dollars and eighty-one cents ($17,763.81); and whereas this Common Council adopted and approved said estimate report and assessed against the abutting lots and parcels of land the amounts therein set out respectively, pursuant to the recommendation of the Committee on Streets and Alleys on the 14th day of December, 1896; and whereas, the following named persons owners of the lots and tracts of land situate within the City of Lebanon, Indiana, set opposite their names as herein given each lot or tract assessed respectively with the amount specified below have each signed and filed with the Clerk of said City a written agreement promising and agreeing in consideration of the right to pay their respective assessments in ten annual installments to waive all objections to any irregularity or illegality in such assessment and any of the proceedings rela-
122 tive to said improvement, to-wit:"

The WITNESS: Now comes a description of each piece of

property abutting on the street the owner of which signed the waiver, together with the owners' name and the amount of the assessment. Shall I read all that?

Senator GIFFORD: Just read the names and the amount of the assessments.

The WITNESS (Reading):

"Elizabeth Klotz		$443.07
Sarah M. Carpenter		195.75
Mary Huston		194.82
E. R. Harden and Alice Harden		101.08
Hattie O. Bachman		115.79
Mary Helen Van Dake, Anna E. Rose, Annora D. Jennings, Rose H. Olmstead		339.26.
Minerva Gruell		195.30
James M. Zion		176.90
J. C. Collier		362.29
Iola B. Kersey		173.70
David W. Foster, Bohanna Foster		194.08
David W. Foster		92.52
Abram O. Miller		366.66
Nancy Parkhurst		192.98
Theodore L. Zion		176.89
Robert H. Kersey		418.13
James F. Kersey		192.99
James F. Kersey		192.99
James E. Pinnell		323.46
Martha H. Dailey, George W. Busby		570.90
Samuel C. Clay		194.08
123 Mary J. Cox		$248.22
Mary J. Cox		248.22
Morris Richie, Isaac F. Long		418.14
Irvin A. Richie		64.72
Daniel Overleese		151.18
Thomas Kersey		395.62
Samuel H. Wilcox		148.81
Making a total of		$6,888.55

Therefore:

SECTION 1. Be It Ordained by the Common Council of the City of Lebanon, Indiana, That for the purpose of insuring the collections of said assessment, street improvement bonds be issued in the name of the City of Lebanon, Indiana, to the amount of six thousand eight hundred dollars ($6,800.00) which bonds when issued shall belong exclusively to said contractors and shall be accepted by them in full payment of the contract price for the improvement of said street; that said bonds shall be numbered from one to ten, inclusive, and shall each be of the denomination of six hundred and eighty dollars; that bond number one shall be payable on the third Monday of April, 1897, bond number two on the third Monday of April, 1897; bond number three on the third Monday of April, 1899; bond number

four on the Third Monday of April 1900; bond number five on the third Monday of April, 1901; bond number six on the third Monday of April, 1902; bond number seven on the third Monday of April, 1903; bond number eight on the third Monday of April, 1904; bond number nine on the third Monday of April, 1906; that the principals of said bonds shall bear interest at the rate of six per cent. per
124 annum from the date of the acceptance of said improvement, December 14th, 1896, and such interest shall be evidenced by interest coupons due and payable as follows, to-wit:

Number one for the entire interest on the principal of each of said bonds from December 14th, 1896, until the third Monday of April, 1897, shall be payable on said day last named; all other coupons shall be for the respective semi-annual interest due on each said bonds thereafter, and shall be payable on the third Monday in October and April respectively thereafter, and each of said bonds with interest coupons thereto attached shall be payable at the Third National Bank of New York.

Said bonds shall bear the following statement, in addition to any other necessary statement: "Issued for the improvement of West Main street from west corporation line to the west side of Lebanon street in the city of Lebanon, Indiana."

SECTION 2. Said bonds shall be issued in the name of the City of Lebanon, Indiana, and the bonds and coupons shall be signed by the Mayor and City Clerk and sealed with the corporate seal of said City.

SECTION 3. The City Clerk is hereby directed to place upon the City tax duplicate the assessments herein above enumerated and charge against said several lots, parcels and tracts of lands, respectively, as follows: ten per cent. of each of said assessments for each successive year for ten years, to which several amounts shall be added and placed on said tax duplicate interest at six per cent. per annum which shall be collected from the date of the acceptance of said improvement by said Common Council.

125 SECTION 4. This ordinance shall be in full force and effect from and after its passage.

REZIN HOSFORD.

Ordained and established this 8th day of February, 1897.

R. C. GARRETT, *Mayor.*

Attest:

WILL A. TULL,
City Clerk.

Councilman Hooton moved that the rules be suspended and the ordinance be placed on its passage. Roll call on suspension. Bratton, Hooton, Hosford, Reagan and Troutman voting Aye; voting No, none. The Mayor declared the rules suspended. Roll call on passage resulted as follows, to-wit: Councilmen Bratton, Hooton, Hosford, Troutman and Reagan voting Aye. Voting No, none. Two-thirds of the full Council present and voting Aye, voting No,

none, the Mayor declared the ordinance ordained and established this eighth (8) day of February, 1897.

R. C. GARRETT, *Mayor.*

Attest:

WILL A. TULL,
City Clerk."

Cross-Examination of E. W. Roberts.

Cross-examination.

Questions by Judge L. J. HACKNEY:

Q. Were there any other proceedings, or is there a record of any other or further proceedings concerning this street improvement and the assessments upon property for it than those you have mentioned and which have gone in evidence here?

A. Well, there is an assessment of record, that is, of those that have filed waivers, and also a record of those that filed waivers and then the assessment duplicate on which the assessment of those who have filed waivers——

126 Q. Are those matters you refer to proceedings of the Council or the proceedings of the Clerk?

A. No, sir; it is the result of the Clerk's work.

Q. What I want to know is whether there are any other proceedings of the Council, or Committees of the Council, in the ordering of this improvement, reports concerning the improvement and any assessments that have been made, other than those you have mentioned and which have gone in evidence.

A. None that I know of.

Q. The question I am proposing to ask may not be strictly competent, but I want it before your Honor at this time—Have you examined specially that assessment roll with a view of disclosing as to the property in question here that there is not any assessment against the railroad company.

The COURT: Do any of these proceedings, at any stage, describe any of the ground that is in dispute here, or refer to the railroad company in any way?

Senator GIFFORD: No, your Honor, I think not.

The COURT: If that is agreed——

Senator GIFFORD: I think it simply describes the first line of lots.

Judge HACKNEY: I want it before the Court that these lots described as Walton's and Kersey's and Mrs. Kelley's are the front lots.

Q. They are the front lots, are they not, or do you know?

A. They are next to the street.

Q. And the property here in question, the railroad company property, lies back from the street and behind these lots of Kersey, Kelly and Walton?

A. That is the Big Four, yes, sir.

127 By Senator GIFFORD:

Q. As I understand it these three lots lie facing on the street?
A. Yes, sir.
Q. And immediately back of them is the Big Four Railroad joining th-m on the other side of its track?
A. Yes, sir.
Q. Lying immediately east?
A. South; the railroad lies south; I might say south and west.
Q. South of one and west of the other?
A. Yes, sir.
Q. And they lie next to the railroad on one side and the street on the other?
A. Yes, sir.

Witness excused.

Direct Examination of John L. Wade.

JOHN L. WADE, a witness for the plaintiff being first duly sworn, testified as follows:

Examination-in-chief.

Questions by Senator GIFFORD:

Q. State your name.
A. John L. Wade.
Q. What position do you occupy in Boone County, if any?
A. Deputy County Clerk.
Q. What papers are those you have in your hand?
A. They are papers belonging to the files of the Boone County Court.
Q. Have you examined them to see if there are any other
128 pleadings there except the complaint and summons?
A. The complaint and two summons, an order to sell, and the sheriff's certificate of sale.
Q. In what cause is that?
A. That is the cause of Robert L. Porter, Chester D. Hadley and others against John T. Walton, to foreclose street assessment number a hundred and ninety eight.
Q. Of the Boone Circuit Court.
A. Yes, sir.
Q. You may tell what papers those are, and in what case they are.
A. These are papers belonging to the files of the Boone County Circuit Court in the case of Robert L. Porter and others *versus* Mary Kelly and others, to foreclose street assessment in the Boone Circuit Court.
Q. What papers are there?
A. Complaint, one summons and the decree or order to sell, and the sheriff's certificate of sale.
Q. What is the number of that cause?
A. This is cause number 197 of the Boone Circuit Court.

Q. What papers are those?

A. These are papers belonging to the files of the Boone Circuit Cour in the cause of Robert L. Porter, Chester D. Hadley and others against John P. Walton to foreclose street assessment, Number 199.

Q. What papers are in that package?

A. The complaint, two summons, the order of sale, the decree and the sheriff's certificate of sale.

Senator GIFFORD: I will introduce in evidence these papers in cause number 199 in the Boone Circuit Court, the complaint, the two summons, the decree, and the certificate of purchase.

129 The said papers were admitted and read in evidence, the same being in the words and figures following, to-wit:

Complaint in Former Foreclosure.

"STATE OF INDIANA, *County of Boone, ss:*

In the Boone Circuit Court, January Term, 1897.

ROBERT L. PORTER, CHESTER G. HADLEY, MELVIN L. BOWLIN, Plaintiffs,
vs.
JOHN T. WALTON, Defendant.

The above named plaintiffs complain of the above named defendant and for a cause of action against said defendant allege the following state of facts: That the City of Lebanon, in Boone county, in the State of Indiana, is a municipal corporation; that the common council of the said city of Lebanon, Indiana, by a two thirds vote of all is members on the 27th day of January, 1896, adopted a declaratory resolution for the improvement of West Main street in said city from the west corporation line to the west side of Lebanon street, providing for grading and paving the same and constructing sidewalls and lawns, and that said common council in said declaratory resoution fixed the 24th day of February, 1896, and the council chanber of said city as the time and place when and where persons interested in said proposed improvement might appear before said common council and object to the improvement of said street, that said common council in said resolution directed the clerk of said city to give ten days' notice by two weeks' publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place of hearing such objections; that the

130 clerk of said city did give ten days' notice by two weeks' publication in the Lebanon Patriot, aforesaid of the time and plac when and where persons interested in said improvement might appar before said common council and object to the making of said improvement; that on the 16th day of April, 1896, the common council of said city by a two thirds vote of all its members adopted a special ordinance ordering the improvement of West Main stret in said city from the west corporation line to the west side of

Lebanon street in the manner provided in the declaratory resolution aforesaid, and fixing in said ordinance the 18th day of May, 1896, as the date for receiving bids for the construction of said improvement and directing the clerk of said city to give three weeks' notice by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place fixed for receiving such bids; that the clerk of said city did give three weeks' notice by publication in the aforesaid Lebanon Patriot, for three weeks, of the time and place when and where the common council of said city would receive bids for the construction of said improvement; that on the said 18th day of May, 1896, six separate bids were filed for the construction of said improvement, that the common council of said city rejected all of said bids as being excessive and ordered the clerk of said city to again give three weeks' notice by publication in the aforesaid Lebanon Patriot that said common council would receive bids for construction of said improvement on the 24th day of June, 1896, the city clerk of said city did give notice by three weeks' publication in the aforesaid Lebanon Patriot that the common council of said city would receive bids for the construction of said improvement on the 24th day of June, 1896; that upon the said 24th
131 day of June, 1896, five separate bids for the construction of said improvement were filed before said common council; that the plaintiff's herein as partners in the style and firm name of Porter, Bowlin & Hadley filed before said common council a bid for the construction of said improvement; that after mature consideration the common council of said city accepted the bid of the plaintiffs herein for the improvement of said street and awarded to them the contract thereofor; and upon the 24th day of June, 1896, the plaintiffs herein entered into a formal contract with said city for the improvement of said street and gave bond for the faithful discharge of said contract as provided by law; that pursuant to the terms of the said contract the plaintiffs entered upon the construction of said improvement and fully completed the same in accordance with said contract and the specification therefor prior to the 14th day of December, 1896; that on the 14th day of December 1896, the common council of said city accepted said improvement as fully completed according to the contract and specifications therefor, and made an order directing the city civil engineer of said city to prepare and file an estimate of the cost and expenses of said improvement as provided by law; that on the said 14th day of December 1896, the city civil engineer of said city filed before said common council his estimate of the cost and expenses of constructing said improvement, which estimate was on said date refered by said common council to its Committee on streets and alleys, which Committee was then and there appointed for that purpose, and said common council fixed the 4th day of January, 1897, and the council chamber of said city as the time and place for the meeting of said committee to consider said report and directed the city clerk to give two weeks' notice of the time and place of the meeting of said committee by publica-
132 tion in the Lebanon Patriot, a weekly newspaper printed and published in said city, and the city clerk did give such no-

tice as directed by said common council; that said committee on Streets and Alleys made report to said common council on the 14th day of January 1897, recommending that the estimate of the costs of said improvement be amended and modified as shown in corrected estimate filed with said report, and recommending that the several amounts set out in said report be assessed against the several lots and parcels of ground respectively abutting on said street as therein set out and described, a copy of which corrected and amended estimate report is filed herewith, made a part hereof and marked exhibit "A."

That said common council on the 14th day of January 1897, by a two-thirds vote of all its members adopted the report of said committee on streets and alleys and assessed against the lots and parcels of land respectively abutting on said street as described in said corrected estimate report, the several amounts as therein set out; that the defendant, John T. Walton is the owner of the following described unplatted land lying within the corporate limits of the city of Lebanon, Indiana, and abutting upon the street improved, to-wit: Commencing in the center of the Crawfordsville State road twelve rods west of the east line of the southwest quarter of the northeast quarter of section 36, township 19 north, range 1 west, thence south 49½ degrees, west 112½ feet, thence north 71½ feet, thence north 89 degrees, east 85½ feet with the center of said road to the beginning, containing 7/100 acres.

That said above described real estate was assessed by the common council of the said city of Lebanon, Indiana, for the improve-
133 ment of said street the sum of eighty-nine dollars and seventy-six cents, on the 14th day of January 1897; that said defendant, John T. Walton, has for more than twenty days since the making of said assessment wholly failed and refused to pay said assessment and did not within two weeks after the making of said assessment make application in writing for the privilege of paying said assessment in ten annual installments as provided by law; that the amount of said assesment together with six per cent. interest thereon from the 14th day of December 1896, is due and owing to the plaintiffs from said defendant and remains wholly unpaid; that fifty dollars is a reasonable attorney fee for the plaintiffs' attorney in this suit to foreclose said assessment; wherefore the plaintiffs pray judgment against the defendant for eighty-nine dollars and seventy six cents with interest thereon at the rate of six per cent. per annum from the 14th day of December, 1896, for fifty dollars attorney fee, for costs, for the foreclosure of the lien of the assessment herein sued upon and an order for the sale of the real estate herein described in parcels of fifty feet each as provided for by law and for all other proper relief.

SAMUEL P. ARTMAN,
Att'y for Plaintiffs.

Endorsement on Back of Complaint.

(Endorsement:) No. 199. In the Boone Circuit Court. January Term, 1897. Robert L. Porter Chester G. Hadley Melvin L.
134 Bowlin *vs.* John T. Walton. Complaint to foreclose street assessment. The Clerk will issue summons returnable March 19th, 1897. Filed, Mar. 4, 1897. Oliver P. Worley, Clerk. Exhibit No. 1, Feb. 25, 1902. Garber, Rep. Samuel R. Artman, Att'y for Plaintiffs.

Summons in Former Foreclosure.

Summons.

STATE OF INDIANA, *Boone County, ss:*

The State of Indiana to the Sheriff of said County, Greeting:

You are hereby commanded to summons John R. Walton to appear in the Circuit Court of Boone County, before the Judge thereof, on the 19th day of March, 1897, the 65th day of the January Term, being held in the Court House in Lebanon, commencing on the first Monday of January, 1897, to answer the complaint of Robert L. Porter, to foreclose street assessment and of this writ make due return.

Witness, the Clerk of said Court, and the seal thereof, hereunto affixed, at Lebanon, this 6th day of March, 1897.

OLIVER P. WORLEY, *Clerk.*

I hereby certify that the above is a true copy of the original summons.

—— ——, *Sheriff.*

135 Endorsement on Back.

(Endorsement:) D 10 F. B 1 No. 199. Robert L. Porter, *et al. vs.* John T. Walton. Summons. Circuit Court to 65 day of Term. Samuel R. Artman, Att'y for plaintiff.

Sheriff's Fees:

Mileage	$.40
Service	.40
Return	.20
	$1.00

Return.

Came to hand March 6th, 1897.

Served as commanded by reading to, and within the hearing of John T. Walton.

This the 8th day of March 1897.

WILLIAM E. PRICE, *Sheriff.*

Exhibit No. 1, Garber, Rep.

2nd Summons in Former Foreclosure.

Summons.

STATE OF INDIANA, *Boone County, ss:*

The State of Indiana to the Sheriff of said County, Greeting:

You are hereby commanded to summons, John T. Walton, Nancy Walton, to appear in the Circuit Court of Boone County, before the judge thereof, on the 16th day of March 1897, the 62 day of the January Term, being held in the Court House in Lebanon,
136 commencing on the first Monday of January 1897, to answer the complaint of Robert L. Porter to foreclose street Assessment and of this writ make due return.

Witness, The Clerk of said Court and seal thereof; hereunto affixed, at Lebanon this 5th day of March 1897.

OLIVER P. WORLEY, *Clerk.*
—— ——, *Sheriff.*

Endorsement on Back of Summons.

(Endorsement:) No. 199. 471. Robert L. Porter, *et al. vs.* John F. Walton, *et al.* Summons. The 62 day of Term. Samuel R. Artman, Att'y for Plaintiff. Exhibit No. 1, Garber, Rep.

Sheriff's Certificate of Sale.

I, William E. Price, Sheriff of Boone County, in the State of Indiana, certify that I have this day sold by virtue of decree and order of sale to me directed from the Clerk of the Circuit Court of Boone county, Indiana, issued on the 25th day of March 1897, in a case wherein Robert L. Porter, *et al.* are plaintiffs and John T. Walton is defendant, wherein judgment was rendered on the 17th day of March 1897, for the sum of one hundred five dollars and fifty nine cents, principal and interest to date of judgment, and the further sum of eleven dollars and fifteen cents, costs accrued to that date, upon which there had accrued sixty-five cents interest, and twelve dollars and sixty-five cents costs, making in all one hundred
137 six dollars and twenty-four cents principal and interest, and twenty-three dollars and eighty cents costs to date of sale, making the total amount due one hundred thirty dollars and four cents. And the said William E. Price as sheriff, aforesaid, advertised for sale, according to law, or levied said decree and order of sale upon the following described real estate as property of John T. Walton on the 1st day of April 1897, to-wit: Commencing in the center of the Crawfordsville State road twelve (12) rods west of the east line of the South-west quarter of the northeast quarter, of section thirty-six (36) in Township nineteen (19) north range one (1) west: thence south forty-nine and one half (49½) degrees west one hundred and twelve and one half (112½) feet; thence north seventy-one and one half (71½) feet; thence north eighty-nine (89) de-

Sheriff's Certificate of Sale in Former Foreclosure.

gress; cast eighty-five and one half (85½) feet with the center of said road to the beginning, containing seven one-hundredths of an acre, all in the city of Lebanon, Boone county and State of Indiana. And said sale was set for the 24th day of April 1897, and the said William E. Price, sheriff as aforesaid, did, upon said day, between the hours prescribed by law, at the door of the Court House, of Boone county, offer for sale at public auction, the rents and profits of said real estate for a term not exceeding seven years, and having received no bid therefor, he did then and there offer for sale at public auction the fee-simple of said real estate, and R. H. Kersey having bid the sum of five dollars and twenty-five cents, and no person bidding more, the same was in due form, openly struck off to the said R. H. Kersey, he being the highest and best bidder therefor, and that being the highest and best price for the same; the said R. H. Kersey paid the amount so bid by him.

138 The aforesaid certificate will entitle the said R. H. Kersey the purchaser of said real estate as aforesaid, to a deed in fee simple to said premises in one year from the date of sale, if the same is not redeemed by the defendant, or any other person entitled thereto, paying the purchase money, with interest at eight per cent. per annum, before the expiration of one year from the day of sale aforesaid.

WILLIAM E. PRICE,
Sheriff of Boone County.

April 24th, 1897, by Henry Lamb, Deputy.

Endorsed on Back of Certificate of Sale.

Endorsed on back: Sheriff of Boone County to R. H. Kersey. Sheriff's Certificate of Sale. In the cause of Robert L. Porter *et al. vs.* John T. Walton.

STATE OF INDIANA, *Boone County, set:*

The State of Indiana to the Sheriff of said County:

Whereas on the 63″ Judicial day of the January Term, 1897, of the Boone Circuit Court, being the 17th day of March, 1897, said Court rendered the following judgment and decree in this case as follows to-wit:

Decree in Former Foreclosure.

ROBERT L. PORTER, MELVIN L. BOWLIN, CHESTER G. HADLEY,
vs.
JOHN T. WALTON.

Come now the plaintiffs by their attorney, and, it appearing from the return of the sheriff on the summons issued in this cause that the defendant had been served with said summons more than ten days

prior to the date fixed for the return thereof by endorsement
139 on the plaintiff's complaint, which, summons and the return thereon are in the words and figures following, to-wit: (here insert), and said defendant failing to appear and answer the plaintiff's complaint, is three times loudly called in open Court and comes not but wholly makes default herein.

And now this cause is submitted to the court for trial, finding, judgment and decree without the intervention of a jury.

And the Court having heard the evidence and being sufficiently advised in the premises, finds for the plaintiffs; that the material allegations of the plaintiffs complaint are true, that there is due the plaintiffs upon the assessment sued on the sum of ninety dollars and fifty-nine cents, principal and interest, and the further sum of fifteen dollars attorney's fees and the cost of this action taxed at nine dollars, without any relief from valuation or appraisement laws; that the plaintiffs are entitled to the foreclosure of the lien of said assessment upon the real estate described in their complaint, and the sale of said real estate to pay said assessment, attorney's fees and costs, which real estate is hereinafter described. It is therefore considered, adjudged and decreed by the Court that the plaintiffs recover of and from the defendant, John T. Walton, the sum of one hundred and five dollars and fifty-nine cents, their damages assessed by the court as aforesaid, and also their costs and charges in this behalf laid out and expended, taxed, at — dollars and cents without any relief whatever from valuation or appraisement laws.

The judgment to bear interest at the rate of six per cent. per annum from the rendition thereof until paid.

140 And it is further considered adjudged and decreed by the Court that the equity of redemption of the defendant and all persons claiming under, from or through him in and to said real estate, to-wit: Commencing in the center of the Crawfordsville State road twelve rods west of the east line of the southwest quarter of the northeast quarter of section thirty-six, in township nineteen north, range one west, thence south forty-nine and one half degrees west one hundred twelve and one half feet, thence north seventy-one and one-half feet, thence north eighty-nine degrees, east eighty-five and one-half feet, with the center of said road to the beginning, containing seven one hundredths of an acre, all in the city of Lebanon, Boone county Indiana, as described in the assessment sued on and in the plaintiffs complaint, be and the same is hereby forever barred and foreclosed, and that said real estate and all the rights, title, interest and claim of the defendant and of all persons claiming from, under or through him in and to the same shall be sold by the sheriff of the county of Boone, in the State of Indiana, after duly advertising the same, in like manner as lands are sold under executions issued upon judgments at law, such sale to be made without any relief whatever from valuation or appraisement laws, and the proceeds arising from such sale the sheriff is ordered and directed to apply as follows, to-wit:

First. To the payment of all costs accrued in this cause, and the costs of said sale.

Second. To the payment of the amount due the plaintiffs on this judgment, with interest thereon as aforesaid. The overplus, if any, remaining after the payment of the aforesaid judgment, interest and costs, to be paid by the sheriff to the clerk of this court
141 for the use of the party lawfully authorized to receive the same.

It is further ordered by the Court that a duly certified copy of this decree, under the hand of the Clerk and the seal of this court shall be sufficient authority to the sheriff to execute the same. All of which is finally ordered, adjudged and decreed by the court.

"Sheriff's Sale.

By virtue of a certified copy of a decree to me directed from the clerk's office of the Boone Circuit Court in a cause wherein Robert L. Porter *et al.* are plaintiffs, and John T. Walton is defendant, requiring me to make the sum one hundred and five dollars and fifty-nine cents ($105.59) with interest on said decree and costs, I will expose at public sale to the highest bidder, on Saturday the 24th day of April A. D. 1897, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day, at the door of the Court House of said Boone county, Indiana, the rents and profits for a term not exceeding seven years, of the following described real estate, to-wit: Commencing in the center of the Crawfordsville State road twelve (12) rods west of the east line of the southwest quarter of the northeast quarter of section thirty-six (36) in township nineteen (19) north, range one (1) west; thence south forty-nine and one half (49½) degrees west one hundred and twelve and one half feet (112½); thence north seventy-one and one half (71½) feet; thence north eighty-nine (89) degrees east eighty-five and one half (85½) feet with the center of said road to the beginning, containing seven one hundredths (7/100) of an acre, all in the city of Lebanon, Boone county state of Indiana.

If such rents and profits will not sell for a sufficient
142 sum to satisfy said decree, interest and costs I will, at the same time and place, expose, at public sale the fee simple of said real estate, or so much thereof as may be sufficient to discharge said decree, interest and costs.

Said sale will be made without any relief whatever from valuation or appraisement laws.

WILLIAM E. PRICE,
Sheriff of Boone County.

Advertised April 1, 1897. $9.00.

S. R. ARTMAN,
Attorney for Plaintiffs."

"STATE OF INDIANA, *Boone County, ss:*

I, Oliver P. Worley, Clerk of the Boone Circuit Court in and for said County and State do hereby certify that the above and fore-

going is a full, true and complete copy of the judgment and decree of the above entitled cause, as the same appears of record and on file in my office.

Witness my hand and seal of said Court this the 25th day of March.

OLIVER P. WORLEY,
Clerk of Boone Circuit Court.

You are therefore commanded, after giving the legal notice required by law to sell the above described premises, in accordance to this decree and law without relief from valuation or appraisement laws, and have the money arising from said sale at the Clerk's office, in one hundred and eighty days from this date, to satisfy said judgment, interest and costs, and return this writ, with your proceedings endorsed thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Lebanon this 25th day of March,
143 1897.

OLIVER P. WORLEY, *Clerk.*

Endorsed on back: "Ex. D. 8—277 Ex. D. 4 page 188 Sale book page 149 J. D. 12—2.33" "Box 471 Boone County Court, Robert L. Porter, *et al.* Order of Sale, John T. Walton, Ex. No. 2 Garber.

Decree	$105.59
Cost of Suit	9.00
Costs Accrued	.15
This Writ	2.00"

"Sheriff will calculate interest from date of decree, Sold to R. H. Kersey $5.25, Repleviable. "Returnable in 180 days" "S. R. Artman, Attorney" "Came to hand March 25th 1897 at 4 P. M. Advertised April 1st, 1897. Sale set for April 24th, 1897." "Received of William E. Price sheriff, the sum of two and 60/100 dollars on this writ. Oliver P. Worley, Clerk of B. C. C."

Senator GIFFORD: Now, if the Court please, I offer in evidence the same papers in cause number 198 of the Boone Circuit Court.

The said papers were admitted and read in evidence the same being in the words and figures following, to-wit:

STATE OF INDIANA, *County of Boone, ss:*

In the Boone Circuit Court, January Term, 1897.

144 *Complaint in Former Foreclosure.*

CHESTER G. HADLEY, ROBERT L. PORTER, MELVIN L. BOWLIN, Plaintiffs,

vs.

JOHN T. WALTON, Defendant.

The above named plaintiffs complain of the above named defendant and for a cause of action against said defendant allege the following state of facts:

That the city of Lebanon, in Boone county, in the State of Indiana, is a municipal corporation, that the common council of the said city of Lebanon, Indiana, by a two thirds vote of all of its members on the 27th day of January 1896, adopted a declaratory resolution for the improvement of West Main street in said city from the West corporation line to the west side of Lebanon street, providing for grading and paving the same and constructing sidewalks and lawns, and that said common council in said declaratory resolution fixed the 24th day of February 1896, and the council chamber of said city as the time and place when and where persons interested in said proposed improvement might appear before said common council and object to the improvement of said street, that said common council in said resolution directed the clerk of said city to give ten days' notice by two weeks' publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place of hearing such objections; that the clerk of said city did give ten days' notice by two weeks' publication in the Lebanon Patriot, aforesaid, of the time and place when and where persons interested in said improvement might appear before said com-

145 mon council and object to the making of said improvement; that on the 16th day of April 1896, the common council of said city by a two thirds vote of all its members adopted a special ordinance ordering the improvement of West Main street in said city from the west corporation line to the west side of Lebanon street in the manner provided in the declaratory resolution aforesaid, and fixing in said ordinance the 18th day of May 1896, as the date for receiving bids for the construction of said improvement and directing the clerk of said city to give three weeks' notice by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place fixed for receiving such bids, that the clerk of said city did give three weeks' notice by publication in the aforesaid Lebanon Patriot, for three weeks of the time and place when and where the common council of said city would receive bids for the construction of said improvement; That on the said 18th day of May 1896, six separate bids were filed for the construction of said improvement, that the common council of said city rejected all of said bids as being excessive and ordered the clerk of

said city to give three weeks' notice by publication in the aforesaid Lebanon Patriot that said common council would receive bids for the construction of said improvement on the 24th day of June 1896, the city clerk of said city did give notice by three weeks' publication in the aforesaid Lebanon Patriot that the common council of said city would receive bids for the construction of said improvement on the 24th day of June 1896, that upon the said 24th day of June 1896, five separate bids for the construction of said improvement were filed before said common council, that the plaintiffs herein as partners in the style and firm name of Porter, Bowlin & Hadley filed before said common council a bid for the construction
146 of said improvement; that after mature consideration the common council of said city accepted the bid of the plaintiffs herein for the improvement of said street and awarded to them the contract therefor, and upon the 24th day of June 1896, the plaintiffs herein entered into a formal contract with said city for the improvement of said street and gave bond for the faithful discharge of said contract as provided by law, that pursuant to the terms of said contract the plaintiffs entered upon the construction of said improvement and fully completed the same in accordance with said contract and the specifications therefor, prior to the 14th day of December 1896; that on the 14th day of December 1896, the common council of said city accepted said improvement as fully completed according to the contract and specifications therefor, and made an order directing the city civil engineer of said city to prepare and file an estimate of the cost and expenses of said improvement as provided by law; that on the said 14th day of December 1896, the city civil engineer of said city filed before said common council his estimate of the cost and expenses of constructing said improvement, which estimate was on said date referred by said common council to its committee on Streets and Alleys, which committee was then and there appointed for that purpose, and said common council fixed the 4th day of January 1897, and the council chamber of said city as the time and place for the meeting of said committee to consider said report and directed the city clerk to give two weeks' notice of the time and place of the meeting of such committee by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, and the city clerk did give such notice as directed by said common council; that said committee on Streets and Alleys
147 made report to the said common council on the 14th day of January 1897, recommending that the estimate of the costs of said improvement be amended and modified as shown in corrected estimate filed with said report and recommending that the several amounts set out in said report be assessed against the several lots and parcels of ground respectively abutting on said street as therein set out and described, a copy of which corrected and amended estimate report is filed herewith, made a part hereof and marked exhibit "A."

That said common council on the 14th day of January 1897, by a two-thirds vote of all its members adopted the report of said committee on Streets and Alleys, and assessed against the lots and

parcels of land respectively abutting on said street as described in said corrected estimate report, the several amounts as therein set out; that the defendant, John T. Walton is the owner of the following described unplatted land lying within the corporate limits of the city of Lebanon, Indiana, and abutting upon the street improved to-wit: Commencing in the center of the Crawfordsville State road 413½ feet west of the east line of the southwest quarter of the northeast quarter of section 36, township 19 north, range one west, thence south 74 feet, thence north 63½ degrees west 161 feet, thence north 89 degrees east 144½ feet with the center of said road to the place of beginning, containing 12/100 acres.

That said above described real estate was assessed by the common council of said city of Lebanon, Indiana, for the improvement of said street the sum of two hundred seventy-three dollars and seventy-eight cents, on the 14th day of January 1897, that the said defendant, John T. Walton has for more than twenty days since the making of said assessment wholly failed and refused to pay said
148 assessment and did not within two weeks after the making of said assessment make application in writing for the privilege of paying said assessment in ten annual installments as provided by law; that the amount of said assessment together with six per cent. interest thereon from the 14th day of December 1896, is due and owing to the plaintiffs from the defendants and remains wholly unpaid; that fifty dollars is a reasonable attorney's fee for the plaintiff's attorney in this suit to foreclose said assessment; Wherefore the plaintiffs pray judgment against the defendant for two hundred and seventy-three dollars and seventy-eight cents with interest thereon at the rate of six per cent. per annum from the 14th day of December, 1896, for fifty dollars attorney's fee, for costs, for the foreclosure of the lien of the assessment herein sued upon and an order for the sale of the real estate herein described in parcels of fifty each as provided by law, and for all other proper relief.

SAMUEL R. ARTMAN,
Att'y for Plaintiffs."

Endorsement on Back of Complaint.

Endorsed on back: No. 198. In the Boone Circuit Court January Term 1897. Robert L. Porter, Chester G. Hadley Melvin T. Bowlin *vs.* John T. Walton. Complaint to foreclose Street Assessment. The Clerk will issue summons returnable March 19th, 1897. Filed
Mar. 4, 1897. Oliver P. Worley, Clerk. Ex. No. 2. Garber.
149 Samuel R. Artman, Att'y for Plaintiffs.

"*Summons.*

STATE OF INDIANA, *Boone County, ss:*

State of Indiana to the sheriff of said county, Greeting:

You are hereby commanded to summon John T. Walton Nancy Walton, to appear in the Circuit Court of Boone County, before the Judge thereof, on the 16 day of March 1897, the 62 day of the

January Term, being held in the Court House in Lebanon, commencing on the first Monday of January 1897, to answer the complaint of Robert L. Porter, to foreclose street assessment and of this writ make due return.

Witness, the Clerk of said Court and seal thereof, hereunto affixed, at Lebanon this 5 day of March 1897.

OLIVER P. WORLEY, *Clerk.*

I hereby certify that the above is a true copy of the original summons.

——— ———, *Sheriff.*"

Endorsed on back: "No. 198." 471. "Robert L. Porter *et al vs.* John T. Walton *et al.*" "Summons, Circuit Court" "To 62 day of Term, S. R. Artman, Att'y for Plaintiffs." "Exhibit No. 2, Garber, Rep."

"*Summons.*

STATE OF INDIANA, *Boone County, ss:*

The State of Indiana to the sheriff of said county, Greeting:

You are hereby commanded to summon John T. Walton, to appear in the Circuit Court of Boone County, before the Judge thereof, on the 19th day of the January Term, being held in the
150 Court House in Lebanon, commencing on the first Monday of January 1897, to answer the complaint of Robert L. Porter, *et al.* to foreclose street assessment and of this writ make due return.

Witness, the Clerk of said Court, and seal thereof, hereunto affixed, at Lebanon this 6 day of March 1897.

OLIVER P. WORLEY, *Clerk.*

I hereby certify that the above is a true copy of the original summons.

——— ———, *Sheriff.*

Endorsement on Back of Summons.

Endorsed on back: "D. 10 & Bl., No. 198." "Robert L. Porter *et al. vs.* John T. Walton." "Summons Circuit Court" "To 65 day of Term, S. R. Artman, Att'y for Plaintiffs."

"Sheriff's Fees:

Mileage	$.40
Service	.40
Return	.20
⅜	$1.00

"Ex. No. 2, Garber, Rep."

"Came to hand March 6th 1897, served as commanded by reading to and within the hearing of John T. Walton this 8th day of March, 1897.

WILLIAM E. PRICE, *Sheriff.*"

"Sheriff's Certificate of Sale.

I, William E. Price, sheriff of Boone county, in the State of Indiana, certify that I have this day sold by virtue of decree and order of sale to me directed from the clerk of the Circuit Court of Boone county, Indiana, issued on the 25th day of March, 1897, in a case wherein Robert L. Porter *et al.* are plaintiffs and John T.
151 Walton is defendant, wherein judgment was rendered on the 17th day of March 1897 for the sum of three hundred and twelve dollars and eighty-eight cents, principal and interest to date of judgment, and the further sum of eleven dollars and fifty cents costs, accrued to that date, upon which there has accrued one dollar and ninety-two cents interest, and twelve dollars and sixty-six cents costs, making in all three hundred and fourteen dollars and eighty cents principal and interest, and twenty-four dollars and sixteen cents costs to date of sale, making the total amount due three hundred and thirty-eight dollars and ninety-six cents. And the said William E. Price, as sheriff aforesaid, advertised for sale according to law, or levied said decree and order of sale upon the following described real estate as property of John T. Walton on the 1st day of April 1897, to-wit: Commencing in the center of the Crawfordsville State road four hundred and thirteen and one-half (413½) feet west of the east line of the southwest quarter of the northeast quarter of section thirty-six (36) township nineteen (19) north range one (1) west; thence south seventy-four (74) feet, thence north sixty-three and one half (63½) degrees west one hundred and sixty-one (161) feet; thence north eighty-nine (89) degrees east one hundred and forty-four and one half (144½) feet to the place of beginning, all in the city of Lebanon, Boone county and State of Indiana. And said sale was set for the 24th day of April 1897, and the said William E. Price, sheriff, as aforesaid, did, upon said day, between the hours prescribed by law, at the door of the Court House of Boone County, offer for sale at public auction, the rents and profits of said real estate for a term not exceeding seven years, and having received no bid therefor, he did then and there offer for sale at public
152 auction, the fee-simple of said real estate, and R. H. Kersey having bid the sum of twelve dollars and no person bidding more, the same was, in due form, openly struck off to the said R. H. Kersey he being the highest and best bidder therefor, and that being the highest and best price bid for the same; the said R. H. Kersey paid the amount so bid by him. The aforesaid certificate will entitle the said R. H. Kersey, the purchaser of said real estate as aforesaid, to a deed in fee-simple to said premises, in one year from the date of sale, if the same is not redeemed by the defendant, or any other person entitled thereto, paying the purchase money, with interest at eight per cent. per annum, before the expiration of one year from the day of sale aforesaid.

Sheriff's certificate of sale in former foreclosure.

April 24th, 1897.

WILLIAM E. PRICE,
Sheriff of Boone County,
By HENRY LAMB, *Deputy.*

Endorsed on back: "Sheriff of Boone County to R. H. Kersey." "Sheriff's Certificate of sale" "In the cause of Robert L. Porter *et al. vs.* John T. Walton."

"STATE OF INDIANA, *Boone County, set:*

The State of Indiana to the sheriff of said county:

Whereas, on the 63rd Judicial day of the January Term, 1897, of the Boone Circuit Court, being the 17th day of March 1897, said Court rendered the following judgment and decree in this case, as follows, to-wit:

Decree in Former Foreclosure.

ROBERT L. PORTER, MELVIN L. BOWLIN, CHESTER G. HADLEY,
vs.
JOHN T. WALTON.

153 Comes now the plaintiffs by their attorney, and, it appearing from the return of the sheriff on the summons issued in this cause, that the defendant has been served with said summons more than ten days prior to the date fixed for the return thereof by endorsement on the plaintiff's complaint, which summons and the return thereon are in the words and figures following, to-wit (here insert).

And said defendant failing to appear and answer the plaintiff's complaint, is three times loudly called in open Court, and comes not, but wholly makes default herein. And now this cause is submitted to the Court for trial, finding, judgment and decree, without the intervention of a jury.

And the Court having heard the evidence and being sufficiently advised in the premises, finds for the plaintiff; that the material allegations in the plaintiff's complaint are true; that there is due the plaintiffs upon the assessment sued on the sum of two hundred and seventy-seven dollars and eighty-eight cents, principal and interest, and the further sum of thirty-five dollars attorney's fee, and the cost of this action taxed at — dollars and — cents, without any relief from valuation or appraisement laws; that the plaintiffs are entitled to the foreclosure of the lien of said assessment upon the real estate described in their complaint and the sale of said real estate to pay said assessment, attorney's fees and costs, which real estate is hereinafter described.

It is therefore considered, adjudged and decreed by the Court that the plaintiffs recover of and from the defendant the sum of three hundred and twelve dollars and eighty-eight cents, their damages assessed by the Court as aforesaid, and also their costs and charges in this behalf laid out and expended, taxed at nine dollars,
154 without any relief whatever from valuation and appraisement laws. The judgment to bear interest at the rate of six per cent. per annum from the rendition thereof. And it is further considered, adjudged and decreed by the court, that the

equity of redemption of the defendant and all persons claiming from, under or through him in and to said real estate to-wit: Commencing in the center of the Crawfordsville State Road four hundred thirteen and one half feet west of the east line of the south west quarter of the northeast quarter of section thirty-six, in township nineteen north, range one west, thence south seventy-four feet, thence north sixty-three and one half degrees west one hundred and sixty-one feet, thence north eighty-nine degrees east one hundred forty-four and one half feet to the place of beginning, all in the city of Lebanon, Boone county, Indiana, as described in the assessment sued on and in the plaintiff's complaint, be and the same is hereby forever barred and foreclosed, and that said real estate and all the rights, title, interest and claim of the defendant and all persons claiming from, under or through him in and to the same, shall be sold by the sheriff of the County of Boone and State of Indiana, after duly advertising the same, in like manner as lands are sold upon executions issued upon judgments at law, such sale to be made without any relief whatever from valuation or appraisement laws, and the proceeds arising from such sale the sheriff is ordered to apply as follows, to-wit:

First. To the payment of all costs accrued in this cause and the costs of said sale.

Second. To the payment of the amount due the plaintiffs on this judgment with interest thereon as aforesaid.

155 The overplus, if any, remaining after the payment of the aforesaid judgment, interest and costs to be paid by the sheriff to the clerk of this Court for the use of the party lawfully authorized to receive the same.

It is further ordered by the Court that a duly certified copy of this decree, under the hand of the Clerk and the seal of this Court, shall be sufficient authority to the sheriff to execute the same.

All of which is finally ordered, adjudged and decreed by the Court."

Sheriff's Sale in Former Foreclosure.

"Sheriff's Sale.

By virtue of a certified copy of a decree to me directed, from the clerk's office of the Boone Circuit Court, in a cause wherein Robert L. Porter *et al.* are plaintiffs, and John T. Walton is defendant, requiring me to make the sum of three hundred and twelve dollars and eighty-eight cents ($312.88), with interest on said decree and costs, I will expose at public sale to the highest bidder on Saturday, the 24th day of April, A. D. 1897, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day at the door of the Court of said Boone County, Indiana, the rents and the profits for a term not exceeding seven years, of the following described real estate to-wit: Commencing in the center of the Crawfordsville state road four hundred and thirteen and one half (413½) feet west of the east line of the southwest quarter of the northeast quarter of section

thirty-six (36) in township nineteen (19) north, range one (1) west thence south seventy-four (74) feet; thence north sixty-three and one half (63½) degrees west one hundred and sixty-one (161) feet; thence north eighty-nine degrees (89) east one hundred and forty-four and one half (144½) feet to the place of beginning, all in the city of Lebanon, Boone county, Indiana.

If such rents and profits will not sell for a sufficient sum
156 to satisfy said decree, interest and costs, I will at the same time and place, expose at public sale, the fee-simple of said real estate or so much thereof as may be sufficient to discharge said decree, interest and cost.

Said sale will be made without any relief whatever from valuation or appraisement laws.

WILLIAM E. PRICE,
Sheriff Boone County.

Advertised April 1, 1897. $8.80.
(S. R. ARTMAN, *Att'y for Plaintiffs.*)

"STATE OF INDIANA, *Boone County, ss:*

I, Oliver P. Worley, clerk of the Boone Circuit Court in and for said County and State do hereby certify that the above and foregoing is full, true and complete copy of the judgment and decree of the above entitled cause, as the same appears of record and on file in my office.

Witness my hand, the seal of said Court, this the 25th day of March, 1897.

OLIVER P. WORLEY,
Clerk of the Boone Circuit Court.

You are therefore commanded, after giving the legal notice required by law to sell the above described premises, in accordance to this decree and law without relief from valuation or appraisement laws, and have the money arising from said sale at the Clerk's office in one hundred and eighty days from this date, to satisfy said judgment, interest and costs and return this writ, with your proceedings endorsed thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Lebanon this 25th day of March 1897.

OLIVER P. WORLEY, *Clerk.*

157 Endorsement.

Endorsed on back: "Ex. D 8-276, J. D. 12-233, Ex. D 4 page 192, Sale Book page 147" "Box 471, Boone Circuit Court, Robert L. Porter, *et al.* Order of Sale, John T. Walton, Ex. No. 1 Garber, Rep., Decree, $312.88, Cost of Suit, $9.00 Cost accrued $.50, This writ $2.00" "Sheriff will calculate interest from date of Decree. Sold to R. H. Kersey, $12.00, Repleviable." "Returnable in one hundred eighty days." "S. R. Artman, Attorney." "Came to hand March 25th 1897, at 4 P. M., Advertised April 1st, 1897. Sale set for April

24th 1897. Received of William E. Price, Sheriff the sum of nine and 14 1/100 Dollars on this writ. Oliver P. Worley, Clerk B. C. C."

Senator GIFFORD: I will also offer in evidence, may the Court please, the same papers in cause 197 of the Boone Circuit Court. There is only one summons in this case.

The said papers were admitted and read in evidence the same being in the words and figures following, to-wit:

"STATE OF INDIANA, *County of Boone, ss:*

In the Boone Circuit Court, January Term, 1897.

158 *Complaint in Former Foreclosure.*

ROBERT L. PORTER, CHESTER G. HADLEY, MELVIN L. BOWLIN,
Plaintiffs,
vs.
MARY KELLEY, PATRICK KELLEY, Defendants.

The above named plaintiffs complain of the above named defendants, and for a cause of action against said defendants allege the following state of facts. That the City of Lebanon, in Boone County, in the State of Indiana, is a municipal corporation, that the common council of said city of Lebanon, Indiana, by a two thirds vote of all its members on the 27th day of January 1896, adopted a declaratory resolution for the improvement of West Main street in said city from the west corporation line to the West side of Lebanon street, providing for grading and paving the same and constructing sidewalks and lawns, and that said common council in said declaratory resolution fixed the 24th day of February 1896, and the council chamber of said city as the time and place when and where persons interested in said improvement might appear before said common council and object to the improvement of said street, that said common council in said resolution directed the clerk of said city to give ten days' notice by two weeks publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place of hearing such objections; that the clerk of said city did give ten days' notice by two weeks publication in the Lebanon Patriot aforesaid, of the time and place when and where persons interested in said improvement might appear before said common council and object to the making of said improvement; that on the 16th day of April 1896, the common council of said city by a two-thirds vote of
159 all its members adopted a special ordinance ordering the improvement of west Main street in said city from the west corporation line to the west side of Lebanon street, in the manner provided in the declaratory resolution aforesaid, and fixing in said ordinance the 18th day of May 1896, as the date for receiving bids for the construction of said improvement, and directing the clerk of said city to give three weeks' notice by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time

and place fixed for receiving such bids; that the clerk of said city did give three weeks' notice by publication in the aforesaid Lebanon Patriot for three weeks, of the time and place when and where the common council of said city would receive bids for the construction of said improvement. That on the said 18th day of May, 1896, six separate bids were filed for the construction of said improvement, that the common council of said city rejected all of said bids as being excessive, and ordered the clerk of said city to give three weeks' notice by publication in the aforesaid Lebanon Patriot, that said common council would receive bids for the construction of said improvement on the 24th day of June 1896, the city clerk of said city did give notice by three weeks' publication in the aforesaid Lebanon Patriot, that the common council of said city would receive bids for the construction of said improvement on the 24th day of June 1896; that upon the said 24th day of June 1896, five separate bids for the construction of said improvement were filed before the said common council; that the plaintiffs herein as partners in the style and firm name of Porter, Bowlin & Hadley filed before said common council a bid for the construction of said improvement; that after mature consideration the common council of said city accepted the bid of the plaintiffs herein for the improvement of said street, and
160 awarded to them the contract therefor; and upon the 24th day of June, 1896, the plaintiffs herein entered into a formal contract with said city for the improvement of said street, and gave bond for the faithful discharge of said contract as provided by law; that pursuant to the terms of said contract the plaintiffs entered upon the construction of said improvement and fully completed the same in accordance with said contract and the specifications therefor prior to the 14th day of December 1896, that on the 14th day of December 1896, the common council of said city accepted said improvement as fully completed according to the contract and specifications therefor; and made an order directing the city civil engineer of said city to prepare and file an estimate of the cost and expenses of said improvement as provided by law; that on the said 14th day of December, 1896, the city civil engineer of said city filed before said common council his estimate of the cost and expenses of constructing said improvement, which estimate was on said date referred by said common council to its committee on Streets and Alleys, which committee was then and there appointed for that purpose and said common council fixed the 4th day of January 1897, and the council chamber of said city as the time and place for the meeting of said committee to consider said report and directed the city clerk to give two weeks' notice of the time and place of the meeting of such committee by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, and the city clerk did give such notice as directed by said common council; that said Committee on Streets and Alleys made report to said common council on the 14th day of January 1897, recommending that the estimate of the costs of said improve-
161 ment be amended and modified as shown in corrected estimate filed with said report and recommending that the several amounts set out in said report be assessed against the several lots and

parcels of ground respectively abutting on said street as therein set out and described, a copy of which corrected and amended estimate report is filed herewith, made a part hereof and marked Exhibit "A."

The said common council on the 14th day of January 1897, by a two-thirds vote of all its members adopted the report of said Committee on Streets and Alleys and assessed against the lots and parcels of land respectively abutting on said street as described in said corrected estimate report, the several amounts as therein set out; that the defendant, Mary Kelley, is the owner of the following described unplatted land lying within the corporate limits of the city of Lebanon, Indiana, and abutting upon the street improved, to-wit: Commencing in the center of the Crawfordsville road three hundred and eighty feet east of the west line of the southwest quarter of section thirty-six in township nineteen north, range one west, thence east 230½ feet to the right of way of the Cleveland, Cincinnati Chicago & St. Louis Railway, thence northwest 254 feet and five inches, thence south 113 feet to the place of beginning. That said above described real estate was assessed by the common council of the said city of Lebanon, Indiana, for the improvement of said street the sum of five hundred and eighty eight dollars and fifty-six cents, on the 14th day of January 1897; that the said defendant, Mary Kelley, has for more than twenty days since the making of said assessment wholly failed and refused to pay said assessment and did not within two weeks after the making of said assessment make application in writing for the privilege of paying
162 said assessment in ten annual installments as provided by law; that the amount of said assessment together with six per cent. interest thereon from the 14th day of December 1896 is due and owing to the plaintiffs from said defendant and remains wholly unpaid; that one hundred dollars is a reasonable attorney fee for the plaintiff's attorney in this suit to foreclose said assessment; that the defendant, Patrick Kelley is the husband of the defendant, Mary Kelley and is made defendant herein as such husband. Wherefore the plaintiffs pray judgment against the defendants for five hundred and eighty-eight dollars and fifty-six cents with interest thereon at the rate of six per cent. per annum from the 14th day of December, 1896, for one hundred dollars attorney fee, for costs, for the foreclosure of the lien of the assessment herein sued upon and an order for the sale of the real estate herein described in parcels of fifty feet each as provided for by law and for all other proper relief.

SAMUEL R. ARTMAN,
Att'y for Plaintiffs.

Endorsement.

Endorsed on back: "No. 197." "In the Boone Circuit Court, January Term, 1897 Robert L. Porter, Chester G. Hadley, Melvin L. Bowlin *vs.* Mary Kelley, Patrick Kelley" "Complaint to foreclose Street Assessment" "The Clerk will issue summons return-

able on the 15th day of March 1897. Ex. No. 3, Garber, Rep. Filed Mar. 4, 1897, Oliver P. Worley, Clerk." "Samuel R. Artman, Att'y for Plaintiffs."

"Summons.

STATE OF INDIANA, *Boone County, ss:*

The State of Indiana to the Sheriff of said county, Greeting:

You are hereby commanded to summons Mary Kelley
163 and Patrick Kelley to appear in the Circuit Court of Boone County, before the Judge thereof, on the 15th day of March 1897, the 61st day of the January term, being held in the Court House in Lebanon, commencing on the first Monday of January 1897, to answer the complaint of Robert L. Porter *et al.*, to foreclose street assessment and of this writ make due return.

Witness, the Clerk of said Court, and seal thereof; hereunto affixed, at Lebanon, this 4th day of March 1897.

OLIVER P. WORLEY, *Clerk.*

I hereby certify that the above is a true copy of the original summons.

—— ——, *Sheriff.*

Endorsement.

Endorsed on back: "D 10 F. B 1, No. 197." "Robert L. Porter, *et al. vs.* Mary Kelley *et al.*" "Summons Circuit Court." "Ex-No. 3, Garber, Rep." To 61st day of Term, Samuel R. Artman, Att'y for plaintiffs." "Sheriff's Fees. Mileage $.40, Service $.80, D. R. Return $.20, total $1.40." "Came to hand March 4th 1897, served as commanded by reading to and within the hearing of the defendants herein named, Mary Kelley and Patrick Kelley. This 5th day of March 1897. "William E. Price, Sheriff."

"Sheriff's Certificate of Sale.

I William E. Price, Sheriff of Boone County, in the State of Indiana, certify that I have this day sold by virtue of Decree and Order of Sale to me directed from the clerk of the Circuit
164 Court of Boone County, Indiana, issued on the 25th day of March 1897 in a case wherein Robert L. Porter, *et al.* are plaintiffs, and Mary Kelley and Patrick Kelley are defendants wherein judgment was rendered on the 16th day of March 1897, for the sum of six hundred and sixty-two dollars and thirty-two cents, principal and interest to date of judgment, and the further sum of eleven dollars and fifty cents, costs accrued to that date upon which there has accrued four dollars and nineteen cents interest, and fourteen dollars and thirty-five cents, costs, making in all six hundred and sixty-six dollars and thirty-two cents, principal and interest, and twenty-five dollars and eighty-five cents costs, to date

BLURRED

of sale, making the total amount due six hundred ninety-two dollars and seventeen cents. And the said William E. Price as sheriff aforesaid, advertised for sale according to law, or levied said decree and order of sale upon the following described real estate as property of Mary Kelley, Patrick Kelley on the 1st day of April, 1897, to-wit: Commencing in the center of the Crawfordsville Road three hundred and eighty (380) feet east of the west line of section thirty-six (36) in township nineteen (19) north range one (1) west; thence east two hundred thirty and one half (230½) feet to the right of way of the Cleveland, Cincinnati, Chicago & St. Louis Railway; thence northwest along the line of said right of way two hundred and fifty-four (254) feet and five (5) inches; thence south one hundred and thirteen (113) feet to the beginning, all in Boone County and State of Indiana. And said sale was set for the 24th day of April, 1897, and the said William E. Price sheriff as aforesaid, did upon said day, between the hours prescribed by law, at the door of the Court House of Boone County, offer for sale
165 at public auction the rents and profits of said real estate for a term not exceeding seven years, and having received no bid therefor, he did then and there offer for sale at public auction, the fee-simple of said real estate and Smith F. Cox having bid the sum of seventy-five dollars and no person bidding more, the same was, in due form, openly struck off to the said Smith F. Cox he being the highest and best bidder therefor, and that being the highest and best price bid for the same; the said Smith F. Cox paid the amount so bid by him.

The aforesaid certificate will entitle the said Smith F. Cox the purchaser of said real estate as aforesaid, to a deed in fee simple to said premises in one year from date of sale, if the same is not redeemed by the defendant, or any other person entitled thereto, paying the purchase money, with interest at eight per cent. per annum, before the expiration of one year from the day of sale aforesaid.

WILLIAM E. PRICE,
Sheriff of Boone County,
By HENRY LAMB, *Deputy.*

April 24th, 1897.

Endorsement.

Endorsed on back: "Sheriff of Boone County to Smith F. Cox." "Sheriff's Certificate of Sale." "In the cause of Robert L. Porter *et al. vs.* Mary Kelley and Patrick Kelley."

STATE OF INDIANA, *Boone County, set:*

The State of Indiana to the Sheriff of said County:

Whereas on the 62nd judicial day of the January Term 1897, of the Boone Circuit Court, being the 16th day of March
166 1897, said Court rendered the following judgment and decree in this case, as follows, to-wit:

ED COPY

Decree in Former Foreclosure.

ROBERT L. PORTER, MELVIN L. BOWLIN, CHESTER G. HADLEY,
vs.
MARY KELLEY, PATRICK KELLEY.

Come now the plaintiffs by their attorney, and, it appearing from the return of the sheriff on the summons issued in this cause that each of the defendants have been served with said summons more than ten days prior to the date fixed for the return thereof, by endorsement on the Plaintiff's complaint, which summons and the return thereon, are in the words and figures following, to-wit: (here insert), and said defendants failing to appear and answer the plaintiff's complaint, are each three times loudly called in open Court and come not, but wholly made default herein.

And now this cause is submitted to the Court for trial, finding judgment and decree, without the intervention of a jury.

And the Court having heard the evidence and being sufficiently advised in the premi-es, finds for the plaintiffs; that the material allegations of the plaintiff's complaint are true; that there is due the plaintiffs upon the assessment sued on the sum of five hundred and ninety-seven dollars and thirteen cents, principal and interest, and the further sum of sixty-five dollars attorney's fees, and the costs of this action taxed at eight dollars fifty cents without any relief from valuation or appraisement laws; that the plaintiffs are entitled to the foreclosure of the lien of said assessment upon the real estate described in their complaint and the sale of said real estate to
167 pay said assessment, attorney's fees and costs, which real estate is hereinafter described.

It is therefore considered, adjudged and decreed by the Court that the plaintiffs recover of and from the defendant, Mary Kelley, the sum of six hundred and sixty-two dollars and thirteen cents, their damages assessed by the Court as aforesaid, and also their costs and charges in this behalf laid out and expended taxed at — dollars and — cents without any relief whatever from valuation or appraisement laws.

The judgment to bear interest at the rate of six per cent. per annum from the rendition thereof until paid.

And it is further considered, adjudged and decreed by the Court that the equity of redemption of the defendants and all persons claiming under, from or through them in and to said real estate, to-wit: Commencing in the center of the Crawfordsville road, three hundred and eighty feet east of the west line of the southwest quarter of section thirty-six, in township nineteen north, range one west, thence east two hundred thirty and one half feet to the right of way of the Cleveland, Cincinnati, Chicago & St. Louis Railway, thence northwest along the line of said right of way two hundred and fifty four feet and five inches, thence south one hundred and thirteen feet to the beginning, all in Boone county, Indiana, as described in the assessment sued on and in the plaintiff's complaint, be and the same is hereby forever barred and foreclosed, and that said real estate

and all the rights, title, interest and claim of the defendants and of all persons claiming from, under or through them in and to the same, shall be sold by the sheriff of the county of Boone in the State of Indiana, after duly advertising the same, in like manner
168 as lands are sold upon executions issued upon judgments at law, such sale to be made without any relief whatever from valuation or appraisement laws; and the proceeds asising from such sale the sheriff is ordered and directed to apply as follows, to-wit:

First. To the payment of all costs accrued in this cause, and the costs of said sale.

Second. To the payment of the amount due the plaintiffs on this judgment with interest thereon as aforesaid.

The overplus, if any, remaining after the payment of the aforesaid judgment, interest and costs to be paid by the sheriff to the clerk of this Court for the use of the party lawfully authorized to receive the same.

It is further ordered by the court that a duly certified copy of this decree, under the hand of the clerk and the seal of this Court, shall be sufficient authority to the sheriff to execute the same. All of which is finally ordered, adjudged and decreed by the court."

Sheriff's Sale in Former Foreclosure.

Sheriff's Sale.

By virtue of a certified copy of a decree to me directed, from the clerk's office of the Boone Circuit Court in a cause wherein Robert L. Porter *et al.* are plaintiffs, and Mary Kelley and Patrick Kelley, are defendants, requiring me to make the sum of six hundred and sixty-two dollars and thirteen cents ($662.13) with interest on said decree and costs, I will expose at public sale to the highest bidder, on Saturday, the 24th day of April, A. D. 1897 between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day, at the Door of the Court House of said Boone County, Indiana, the rents and profits for a term not exceeding seven years, of the following de-
169 scribed real estate to-wit: Commencing in the center of the Crawfordsville road, three hundred and eighty (380) feet east of the west line of the southwest quarter of section thirty-six (36) in township nineteen (19) north, range one (1) west; thence east two hundred and thirty and one half (230½) feet, to the right of way of the Cleveland, Cincinnati, Chicago & St. Louis Railway; thence north west along the line of the said right of way two hundred and fifty-four (254) feet and five (5) inches; thence south one hundred and thirteen (113) feet to the beginning, all in Boone County, Indiana.

If such rents and profits will not sell for a sufficient sum to satisfy said decree, interest and costs, I will, at the same time and place, expose at public sale, the fee-simple of said real estate, or so much thereof as may be sufficient to discharge said decree, interest and

costs, said sale will be made without any relief whatever from valuation or appraisement laws;

WILLIAM E. PRICE,
Sheriff Boone County.

Advertised April 1, 1897. $8.60.
(S. R. ARTMAN, *Att'y for Plaintiffs.*)

"STATE OF INDIANA, *Boone County, ss:*

I, Oliver P. Worley, clerk of the Boone Circuit Court, in and for said County and State, do hereby certify that the above and foregoing is a full, true and complete copy of the Judgment and Decree of the above entitled cause, as the same appears of record and on file in my office.

Witness my hand and seal of said Court this the 25th day of March 1897.

OLIVER P. WORLEY,
Clerk of the Boone Circuit Court.

170 You are therefore commanded after giving the legal notice required by law to sell the above described premises in accordance to this decree and law without relief from valuation or appraisement laws, and have the money arising from said sale at the clerk's office in one hundred and eighty days from this date, to satisfy said judgment, interest and costs, and return this writ, with your proceedings indorsed thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Lebanon, this 25th day of March 1897,

OLIVER P. WORLEY, *Clerk.*

Endorsed on back: "Ex D. 8-277, J D 12-233, Ex D 4 page 190, Sale Book page 151." "L R 1-363, No. 197, Boone Circuit Court, Robert L. Porter, *et al.*, Order of Sale, Box 471, Mary Kelley and Patrick Kelley, Decree $662.13, Cost of Suit $8.50, Costs accrued $100. This writ $2.00, Ex. No. 3, Garber, Rep." "Sheriff will calculate interest from date of decree. Sold to S. D. Cox $75.00, Replevable." "Returnable in 180 days." "S. R. Artman, Attorney." "Came to hand, March 25th, 1897, at 4 P. M. Advertised April 1st, 1897. Sale set for April 24th, 1897." "Received from Wliliam E. Price, Sheriff the sum of seventy dollars and twenty-five cents on this writ. Oliver P. Worley, Clerk of B. B. C. Received of William E. Price, Sheriff, forty-nine dollars and fifteen cents in a sheriff's Certificate of sale. Smith F. Cox."

171 *Return of Decree in Former Foreclosure.*

Return of Decree.

Came to hand March 25th 1897, at 4 o'clock P. M. and I advertised within described real estate by first giving notice of the time and place of sale, for at least twenty-one days next before the day of

sale, by posting printed notices thereof in three public places in the township in which said real estate is situated, and one at the Court House door of Boone county Indiana, for at least twenty-one days next before the day of sale, and also by advertising for three weeks successively immediately previous to date of sale, in the Lebanon Pioneer a weekly newspaper of general circulation, printed and published in said county. Said sale was set for the 24th day of April 1897, and I did on that day at the Court House door of Boone county, Indiana, between the hours prescribed by law, expose to sale at public auction, the rents and profits of said real estate for a term of one, two, three, four, five, six, seven, year No bid, I then offered at public sale as aforesaid, the fee simple of said real estate in — and receiving no bid therefor, I then offered each tract jointly, and Smith F. Cox, did then and there bid the sum of seventy-five dollars, and no person bidding more, the same was in due form struck off and sold to said Smith F. Cox, he being the highest and best bidder, and that being the highest and best price bid for the same, and the said Smith F. Cox paid the amount bid by him by receipting this writ for forty-nine dollars and fifteen cents, and by paying all costs taxed at twenty-five dollars and eighty-five cents. I made out and delivered to him a Certificate of Sale of said premises, and I have paid Oliver P. Worley, clerk, the sum of seventy dollars and twenty five cents, in full of all costs made and assessed
172 therein, and forty-nine dollars and ten cents to be paid to plaintiffs except four dollars and seventy-five cents which I retain as my own costs and this writ is now returned not satisfied this 24th day of April 1897.

WILLIAM E. PRICE,
Sheriff, Boone County.

Printer's fee..... $8.60
Sheriff's fee..... $4.75"

Senator GIFFORD: I also offer in evidence, if your Honor please, the sheriff's deed to each of these lots.

The said deeds were admitted and read in evidence the same being in the words and figures following, to-wit:

Sheriff's Deed in Former Foreclosure.

"This indenture, Made this 10th day of April, A. D. 1901 between A. T. Gardner Sheriff of Boone county, in the State of Indiana, of the first part, and Nathaniel Kersey of the County of Boone and State of Indiana of the second part, Witnesseth:

That whereas, At the January Term of the Boone Circuit Court, A. D. 1897 Robert L. Porter, *et al.* recovered by judgment of said Court, in a certain action therein against Mary Kelley and Patrick Kelley the sum of Six Hundred, Sixty-six Dollars and thirty-two cents for all damages, together with the further sum of twenty-five dollars and eighty-five cents for all costs in that behalf expended; and a decree for the sale of all the interest, estate, right and title of

the defendants Mary Kelley and Patrick Kelley in and to certain real estate described therein as follows, viz: Commencing in the center of the Crawfordsville road three hundred and eighty (380) feet east of the west line of section thirty-six (36) in township nineteen (19) north, range one (1) west; thence east two hundred
173 thirty-one and one half (230½) feet to the right of way of the Cleveland, Cincinnati and Chicago and St. Louis Railway, thence northwest along the line of said right of way two hundred and fifty-four (254) feet and five (5) inches, thence south one hundred and thirteen (113) feet to the beginning, all in Boone county and State of Indiana.

All without any relief whatever from valuation or appraisement laws, as by the record thereof, remaining in said Court more fully appears. (See Order Book — page— case No. —.)

And whereas, Afterwards, to-wit on the 25th day of March A. D. 1897 a copy of said judgment and decree was duly issued, and, under the seal of said Court attested by the Clerk thereof, directed to the Sheriff of the County of Boone, commanding him that after due and legal notice of the time and place of making the same, he should sell the land above described, with all the interest, estate, right and title of the defendants Mary Kelley and Patrick Kelley therein, or so much and such parts thereof as might be necessary, according to the terms of said decree, to pay and satisfy the judgment aforesaid, with the interest and costs thereon, and that he should, in like manner, also make and return all interest and accruing costs thereon, and make due return of said writ to the Clerk's office, at the expiration of one hundred and eighty days from the date of the same.

And whereas, Said copy of judgment and order of sale on the 25th day of March A. D. 1897 came to the hands of William E. Price then Sheriff of said county, to be executed, and the said William E. Price as Sheriff as aforesaid, having legally advertised the same, did on the 24th day of April A. D. 1897, at the Court
174 House door in Lebanon in the County aforesaid, between the hours prescribed by law, at public auction, first expose to sale the rents and profits for a term not exceeding seven years of said estate of Mary Kelley and Patrick Kelley in and to said real estate, and no person bidding for the same, then offered at public auction aforesaid, all the rights, title and interest, in fee simple, of the said Mary Kelley and Patrick Kelley in and to said estate, and the said Smith F. Cox did then and there bid the sum of seventy-five dollars and — cents, and no person bidding more, the same was, in due form openly struck off and sold to the said Smith F. Cox for the sum of Seventy-five Dollars and — cents, —— —— being the highest bidder, and that being the highest price bid for the same.

And whereas, Also, on the said 24th day of April A. D. 1897, as required by law, said sheriff executed to said purchaser a certificate setting forth the foregoing facts, with the conditions appended that if said premises were not redeemed within one year from the date thereof, by payment of the purchase money, with eight per centum interest thereon, by said judgment defendants Mary Kelley and

Patrick Kelley, heirs, or assigns to said purchasers, heirs or assigns, said Smith F. Cox would be entitled to a Deed of Conveyance thereof. And afterward to-wit, on the 11th day of May, 1897 the said Smith F. Cox for value received, by his written assignment upon said certificate, properly executed before Harrie Limpus, a Notary Public, conveys all his rights, title and interest in said certificate of sale to Porter, Bowlin & Hadley, and afterwards, to-wit, on the 1st day of April, 1901, the said Porter, Bowlin & Hadley, for value received, by their written assignment upon said certificate properly executed before Glen J. Gifford, a Notary Public, convey all their
175 rights, title and interest in said certificate of sale to John Adam, and afterwards, to-wit, on the 9th day of April, 1901, the said John Adams, for value received, by his written assignment upon said certificate properly executed before A. J. Shelby, a Notary Public, conveys all his right, title and interest in said certificate of sale to Nathaniel Kersey, who now presents the same, and the same not having been redeemed, demands deed for said property.

Now, therefore, To confirm to said Nathaniel Kersey the sale so made as aforesaid, the said A. T. Gardner, as sheriff as aforesaid, in consideration of said sum of Seventy-five Dollars and — Cents to him in hand paid by said Smith F. Cox the receipt whereof is hereby acknowledged and of the non-redemption of said Real Estate as provided by law, hath granted, bargained and sold, and doth by these presents grant, bargain, sell, convey and confirm to the said Nathaniel Kersey, heirs and assigns, forever, all the following real estate, situated in the County of Boone and State of Indiana, to-wit:

Commencing in the center of the Crawfordsville road three hundred, eighty (380) feet east of the west line of section thirty-six (36) in township nineteen (19) north, range one (1) west, thence east two hundred thirty and one half (230½) feet to the right of way of the Cleveland Cincinnati and Chicago and St. Louis Railway; thence northwest along the line of said right of way two hundred and fifty-four (254) feet and five (5) inches; thence south one hundred and thirteen (113) feet to the beginning, all in Boone County and State of Indiana.

To have and to hold, all and Singular, the premises aforesaid,
176 with the privileges and appurtenances to the said Nathaniel Kersey, heirs and assigns, forever, in as full and ample a manner as the same was held by Mary Kelley and Patrick Kelley immediately before the execution of the mortgage mentioned in said decree, foreclosing the same.

In witness whereof, The said A. T. Gardner as Sheriff as aforesaid has hereunto set his hand and seal, the day and year above written.

A. T. GARDNER, [SEAL.]
Sheriff of Boone County, Indiana.

STATE OF INDIANA, *Boone County, ss:*

Before me, John L. Pierce, Clerk of the Circuit Court, in and for said county, personally came A. T. Gardner Sheriff of said County and acknowledged the foregoing conveyance to be his voluntary act and deed, as such Sheriff.

In witness whereof, I hereunto subscribe my name and affix my seal of office, this 16 day of April A. D. 1901.

JOHN L. PIERCE,
Notary Public.

Com. expires June 9, 1902.

Recorded April 16, 1901 at 11 o'clock A. M.
JAMES A. WHITE, *R. B. C.*

Book 1, page 211.

STATE OF INDIANA, *County of Boone, ss:*

I, James A. White, Recorder of Boone County in the State of Indiana, do hereby certify that the within is a true and correct copy of a Sheriff's deed executed by A. T. Gardner as Sheriff of Boone County, Indiana, on the 16th day of April, 1901, to Nathaniel Kersey and recorded in Sheriff's Deed Record No. 1, at page 211 in the Recorder's Office of Boone County, Indiana, on April 16, 1901.

Witness my hand and official seal this 12" day of March
177 1902.

JAMES A. WHITE,
Recorder Boone Co. [SEAL.]."

"This indenture, Made this 16th day of April A. D. 1901 between A. T. Gardner Sheriff of Boone County, in the State of Indiana, of the first part, and R. H. Kersey of the County of Boone and State of Indiana of the second part, witnesseth:

That whereas, at the January Term of the Boone Circuit Court, A. D. 1897 Robert L. Porter *et al.* recovered by judgment of said Court, in a certain action therein against John T. Walton the sum of Three Hundred, Fourteen Dollars and Eighty Cents for all damages, together with the further sum of Twenty-four Dollars and Sixteen Cents for all Costs in that behalf expended; and a decree for the sale of all the interest, estate, right and title of the defendant John T. Walton in and to certain Real Estate, described therein as follows, viz:

Commencing in the center of the Crawfordsville State Road, four hundred and thirteen and one half (413½) feet west of the east line of the southwest quarter of the northeast quarter of section thirty-six (36) Township nineteen (19) north, range one (1) west; thence south seventy-four (74) feet, thence north sixty-three and one half (63½) degrees west, one hundred and sixty-one (161) feet; thence north eighty-nine (89) degrees east one hundred and forty-four and one half (144½) feet to the place of beginning, all in the city of Lebanon, Boone County, and State of Indiana.

178 All without any relief whatever from valuation and appraisement laws, as by the record thereof, remaining in said Court more fully appears. (See Order Book — page — Case No. —).

And whereas, Afterwards, to-wit: on the 25th day of March A. D. 1897, a copy of said judgment and decree was duly issued, and,

under the seal of said Court, attested by the Clerk thereof, directed to the Sheriff of the County of Boone, commanding him that after due and legal notice of the time and place of making the same, he should sell the land above described, with all the interest, estate right and title of the defendant John T. Walton therein, or so much and such parts thereof as might be necessary according to the terms of said decree, to pay and satisfy the judgment aforesaid, with the interest and costs thereon; and that he should, in like manner also make and return all interest and accruing costs thereon, and make due return of said writ to the Clerk's Office, at the expiration of one hundred and eighty days from the date of the same.

And whereas, Said copy of judgment and order of sale, on the 25th day of March A. D. 1897 came to the hands of William E. Price then Sheriff of said County, to be executed, and the said William E. Price as Sheriff as aforesaid, having legally advertised the same, did on the 24th day of April A. D. 1897, at the Court House door in Lebanon, in the County aforesaid, between the hours prescribed by law at public auction, first expose to sale the rents and profits for a term not exceeding seven years, of said estate of John T. Walton in and to said Real Estate, and no person bidding for the same, then offered at public auction aforesaid, all the rights, title and interest, in fee simple, of the said John T. Walton in
179 and to said estate, and the said R. H. Kersey did then and there bid the sum of Twelve Dollars and — cents, and no person bidding more, the same was in due form openly struck off and sold to the said R. H. Kersey for the sum of Twelve Dollars and — cents, being the best bidder, and that being the highest price bid for the same.

And whereas, Also, on the said 24th day of April A. D. 1897 as required by law, said Sheriff executed to said purchaser a certificate, setting forth the foregoing facts, with the conditions appended that if said premises were not redeemed within one year from the date thereof, by payment of the purchase money, with eight per centum interest thereon, by said judgment defendant John T. Walton, heirs or assigns, to said purchasers, heirs, or assigns, said R. H. Kersey would be entitled to a Deed of Conveyance thereof.

Now, therefore, To confirm to said R. H. Kersey the sale so made as aforesaid, the said A. T. Gardner as Sheriff as aforesaid, in consideration of said sum of Twelve Dollars and — Cents to him in hand paid by said R. H. Kersey the receipt whereof is hereby acknowledged, and of the non-redemption of said Real Estate as provided by law, hath granted, bargained and sold, and doth by these presents grant, bargain, sell, convey and confirm to the said R. H. Kersey heirs and assigns, forever, all the following real estate, situated in the County of Boone and State of Indiana, to-wit:

Commencing in the center of the Crawfordsville State Road, four hundred and thirteen and one half (413½) feet west of the east line of southwest quarter of the northeast quarter of section
180 thirty-six (36) township nineteen (19) north, range one (1) west; thence south seventy-four (74) feet, thence north sixty-three and one half (63½) degrees west one hundred and sixty-one

(161) feet; thence north eighty-nine (89) degrees east one hundred and forty-four and one half (144½) feet to the place of beginning, all in the City of Lebanon, Boone County, and State of Indiana.

To have and to hold, All and singular, the premises aforesaid, with the privileges and appurtenances to the said R. H. Kersey heirs and assigns forever, in as full and ample a manner as the same was held by John T. Walton immediately before the execution of the mortgage mentioned in said decree, foreclosing the same.

In witness whereof, The said A. T. Gardner as Sheriff as aforesaid, has hereunto set his hand and seal, the day and year above written.

A. T. GARDNER, [SEAL.]
Sheriff of Boone County, Indiana.

STATE OF INDIANA, *Boone County, ss:*

Before me, John L. Pierce, Clerk of the Circuit Court in and for said County, personally appeared A. T. Gardner, Sheriff of said County and acknowledged the foregoing Conveyance to be his voluntary act and deed, as such Sheriff.

In witness whereof, I hereunto subscribe my name and affix my seal of office, this 16″ day of April A. D. 1901.

JOHN L. PIERCE,
Notary Public.

Com. expires June 19—1901.

Recorded April 16, 1901, at 11 o'clock A. M.

JAMES A. WHITE, *R. B. C.*

Book 1, page 209.

STATE OF INDIANA, *County of Boone, ss:*

I, James A. White, Recorder of Boone County in the State of Indiana, do hereby certify that the within is a true and cor-
181 rect copy of a Sheriff's deed executed by A. T. Gardner as sheriff of Boone County, Indiana, on the 16th day of April, 1901, to R. H. Kersey and recorded in Sheriff's Deed Record No. 1 at page 209 in the Recorder's Office of Boone County, Indiana, on April 16, 1901.

Witness my hand and official seal this 12″ day of March, 1902.

JAMES A. WHITE, [SEAL.]
Recorder Boone County.″

182 *Bill of Exceptions.*

Direct Examination of C. W. Cochrane.

C. W. COCHRANE, a witness for the plaintiff being first duly sworn, testified as follows:

Examination in chief.

Questions by Senator GIFFORD:

Q. State your name.
A. C. W. Cochrane.
Q. What is your business?
A. Civil engineer.
Q. For whom are you working?
A. The Big Four Railroad company.
Q. You may state whether or not you have made the measurements of the following tract of land lying within the corporate limits of the city of Lebanon, Indiana: Commencing at the center of the Crawfordsville road three hundred and eighty feet east of the west line of the southwest quarter of section 36 township 19 north range 1 west; thence east 230 feet to the right of way of the Cleveland, Cincinnati, Chicago and St. Louis Railway; thence northwest with the said right of way and on the south side thereof 254 feet and 5 inches; thence south 113 feet to the place of beginning?
A. Yes, sir.
Q. What is the difference from the street here in controversy across this tract of land back to the Cleveland Cincinnati, Chicago & St. Louis Railroad, if you know?
A. From the south line of the street?
Q. From the line of the street next to the—on the side of the railroad. What is the furthest point of the railroad from the street across that land, in other words?
A. Fifty and 93/100 feet for the right of way.
Q. And what is the shortest distance from the street across
183 to the railroad, across that tract of land?
A. The distance—I only have the angle—that is four and 7/10 feet. It is a small angle.
Q. Then the whole tract is less than a hundred and fifty feet from the railroad to the street at all points along it?
A. Yes.
Q. Following the description on the other side, what is the longest distance from the south side of the street to the right of way of the railroad on that tract?
A. To the right of way—that is about 135 feet.
Q. Now, that is from the center of the road?
A. Yes, sir.
Q. I mean from the north line of the road?
A. About 110 feet.
Q. And what is the shortest distance—an angle, is it?
A. It is the angle of the right of way, yes sir, 25 feet about.

Q. And the tract of land lying there is in what shape?
A. Triangular, the lot is.
Q. And the base of the triangle is next to the railroad?
A. No, sir, that is the hypothenuse. The base of the triangle is—
Q. Next to the street.
A. One side is.
Q. And the other side—the side—that is 100 feet.
A. Yes, sir, the base of the triangle.
Q. The greatest distance then of the railroad from the north edge of the street that is improved here is how far?
A. 108 or 110 feet.

184 *Cross-examination of C. W. Cochrane.*

Cross-examination.

Questions by Judge HACKNEY:

Q. Now, taking this yellow line as describing the lot of Kersey and Walton on the north side of the tracks as having been sold under the foreclosure proceeding, what if any ground lies between that tract and the railroad right of way?

Senator GIFFORD: To which question we object may the Court please, for the reason that the finding of the Council, the descriptions here, carry the description of the tract sold up to and against the right of way of the railroad, and this being a collateral proceeding, even if there is other land in there, the parties to that proceeding are bound by it. Again, to prove the title to other land the record would be the best evidence.

Judge HACKNEY: I will withdraw the question, if the Court please.

Q. What does the yellow line described in the triangle on the east side of A. street on this map indicate?
A. That indicates the portion of the Kersey lot that was sold for the street assessment.
Q. Does that correspond to the description just read from the deed by the plaintiff in this case?
A. It does.
Q. Then what is described within the outer yellow lines of the triangle on the west side of A street, as indicated on this map?
A. That is the lot that belonged to Mary Kelley which was sold for the assessment.
Q. Does that outer yellow line describe the tract as it is described in the deed read in evidence upon the foreclosure of the street assessment lien?

185 The COURT: I think that is a conclusion.

Q. I will ask you if the following language which I read from the certificate of sale introduced in evidence, by the plaintiff describes a tract upon the plat as you have drawn it, and if it does, what parcel it does describe: Commencing at the center of the Crawfordsville road 380 feet west of the west line of section 36 in township 19 north,

range 1 west; thence east 230½ feet; thence northwest 254 feet and five inches; thence south 113 feet to the place of beginning?

A. Yes sir, with the exception I have that six inches instead of five—five tenths.

Q. What tract, as indicated on your plat, does that describe?

A. It describes this Mary Kelley lot.

Q. It describes the tract bounded in yellow lines?

A. Yes, sir.

Q. Indicated there as the Mary Kelley lot?

A. Yes, sir.

Q. Now, you may state, did you make this plat?

A. Yes, sir.

Q. And who made the surveys from which this plat was made?

A. I made the surveys.

Q. You may state whether that plat accurately describes, by metes and bounds and directions and distance, the situation as it appears at the crossing of the defendant's railroad tracks and A street to Main street in the city of Lebanon?

A. It does.

By the COURT:

Q. You described this tract in the triangle as the Mary
186 Kelley tract. Do you know, or did you investigate to learn whether that was the Mary Kelley tract, or did you just designate that yourself?

A. Yes, sir, I investigated it.

Q. Don't the Mary Kelley tract extend out to your right of way?

A. Not when it is checked by metes and bounds.

Q. Didn't the Mary Kelley land, so far as you know, extend out to the right of way? Do you know of any body else that has got any land between Mary Kelley's land and the right of way?

A. I know of no one.

Q. Do you know who owns this piece of ground that you left between that yellow tract and the right of way of the railroad?

A. No, sir.

Q. Then how do you know it is not included in the Mary Kelley tract?

A. Because the distances in the description of the Mary Kelley lot are given.

Q. You are governed entirely by these distances that are given in this deed?

A. Yes, sir.

By Judge HACKNEY:

Q. And being governed by those distances what if anything, giving it by distances, lies between the Mary Kelley tract and the right of way of the Big Four?

A. Why, a strip of land, thirteen hundredths of an acre nearly.

Q. About how long? You can average it or you can give the two sides.

A. 248 feet in length on the north side; 207½ feet on the
187 south side.

Q. And what at the end?

A. 24 86/100 feet at the west end and 45½ feet at the east end.

Q. Now, then returning to the Kersey property, what if any, land lies between the Kersey lot as described and the right of way of the railroad company?

A. There is a small strip of land lying between the Kersey lot and the Big Four right of way.

Q. Of what size?

A. One hundred and sixteen ten thousandths of an acre.

Q. That is the quantity; now give us the dimensions.

A. One hundred and three feet on the north side, the northerly side; a hundred a twelve and a half feet on the southerly side; ten feet and two tenths on the westerly side four feet and seven tenths on the easterly side.

Q. Now, then, I will ask you if there is any land within fifty feet back from Main street, the south line of Main street, and east of A street that is not included within the yellow lines indicated as R. H. Kersey, but not within the right of way of the Big Four Railroad Company?

A. Yes, sir, there is.

Q. Can you indicate it for the reporter, so as to get it in the record?

A. There is land owned by Stewart & Tomlinson.

Senator GIFFORD: May the Court please, we are objecting to that. That, as I understand it is across the railroad.

The COURT: Oh, yes, I do not think the witness can testify how that land is owned. The deeds will show that.

Q. I am asking if there is any ground within fifty feet, within the first fifty feet, that is not included in the triangle indi-
188 cated as Kersey's ground and not included with the right of way of the railroad company, other than you have already stated.

Senator GIFFORD: I object to it, Your Honor, for the further reason that we can proceed against one or all the parties. We do not have to make all of them parties to this suit.

The Court overruled the objection, to which ruling the plaintiff, by counsel, at the time excepted.

A. I cannot describe that by metes and bounds.

The COURT: There is a piece of ground in there; I suppose that is all you want to know.

Judge HACKNEY: Yes; I guess that is all I want to know.

Redirect Examination of C. W. Cochrane.

Re-examination.

Questions by Senator GIFFORD:

Q. What is the width of the strip that you claim is between the yellow lines and the railroad right of way on the south side—the tract on the south side?

A. Twenty-four and 86/100 feet.

Q. And this on the north side, you say the strip is how wide?

A. I gave you that distance before. It is a diagonal distance, the distance of the angle, four and 7/10 feet; slightly less than that.

Q. The tract that you have testified to concerning being on the south side of the railroad and across the railroad is across the railroad from the tract of land known as the Kersey land, is it not?

A. Yes, sir.

Q. What makes the property line on this plat?

189 A. That is it (indicating).

Q. Mark it so that the reporter can identify it.

(The witness did as requested.)

Q. The tract of land you speak of being within fifty feet of the improvement and south of the Kersey land is marked how? How have you marked it?

A. It is marked "G."

Q. Is this little plot across the railroad marked "G" directly south or—does this road run straight?

A. No, sir.

Q. Is it directly south? Is it directly opposite the land improved from the lands improvdd known as the Kersey land?

A. It is not at right angles to it.

Q. It is not at right angles to the street line?

A. No, sir.

Q. How far is that out of right angles from the street line?

A. The east corner of the triangle is very slightly west.

Q. It is slightly west of it?

A. Very so.

Q. But there is no part of that land directly opposite the Kersey land from a perpendicular drawn to the improved portion of the street?

A. No, sir.

Witness excused.

Direct Examination of John L. Wade, Recalled.

JOHN L. WADE, a witness for the plaintiff recalled, testified as follows:

Examination-in-chief.

Questions by Senator GIFFORD:

Q. What cause have you there?

A. I have cause No. 197, Porter *et al. vs.* Kelley, on pages 575, 576 and 577.

Q. What is the amount of that judgment in that case?
190 A. For the sum of a hundred and sixty-two dollars.
Q. That is the wrong case, I see.
A. For the sum of six hundred and sixty-two dollars and thirteen cents, her damages and costs.
Q. That is right. What is the number of that cause?
A. 197.
Q. Now, turn to Cause 198.
A. Cause 198 commences on page 581 and continues on page 582, 583 and closes on page 584.
Q. In what order book?
A. No. 46 of the records of Boone Circuit Court.
Q. Now, how much is the judgment in that case?
A. $312.88.

Senator GIFFORD: Now, may the Court please, I offer these records in evidence.

The said records were admitted and read in evidence, the same being in the words and figures following, to-wit:

Decree in Former Foreclosure.

No. 198.

"ROBERT L. PORTER, MELVIN L. BOWLIN, CHESTER G. HADLEY,
vs.
JOHN F. WALTON.

To Foreclose Street Assessment.

Comes now the plaintiffs by their atorney, and it appearing from the return of the sheriff on the summons issued in this cause, that the defendant has been served with said summons more than ten days prior to the date fixed for the return thereof by endorsement on the plaintiffs' complaint, which summons and the return thereon are in the words and figures following, to-wit: (Here insert)

And the said defendant failing to appear and answer the plaintiffs' complaint is three times loudly called in open Court but
191 comes not, but wholly makes default herein. And now this cause is submitted to the Court for trial, finding, judgment and decree without the intervention of a jury.

And the Court having heard the evidence and being sufficiently advised in the premises finds for the plaintiff-; that the material allegations in the plaintiffs' complaint are true; that there is due the plaintiffs upon the assessment sued on the sum of two hundred and seventy-seven dollars and eighty-eight cents, principal and interest, and the further sum of thirty-five dollars attorney's fee, nd the costs of this action taxed at — dollars and — cents, without any relief from valuation or appraisement laws; that the plaintiffs are entitled to the foreclosure of the lien of said assessment upon the real estate described in their complaint and the sale of said real estate to

pay said assessment, attorney's fees and costs, which real estate is hereinafter described.

It is therefore considered, adjudged and decreed by the Court that the plaintiff recover of and from the defendant the sum of three hundred and twelve dollars and eighty eight cents, their damages assessed by the Court as aforesaid, and also their costs and charges in this behalf laid out and expended, taxed at — dollars and cents, without any relief whatever from valuation or appraisement laws. The judgment to bear interest at the rate of six per cent. per annum from the rendition thereof. And it is further considered, adjudged and decreed by the court that the equity of redemption of the defendant and all persons claiming from under or through him in and to said real estate to-wit: commencing in the center of the Crawfordsville State Road four hundred and thirteen and one-half feet west of the east line of the south-west quarter of the northeast quarter of section thirty-six in township nineteen north, range one west, thence south seventy-four feet, thence north sixty-three and one-half degrees west one hundred and sixty-one feet, thence north eighty-nine degrees east one hundred and forty-four and one half feet to the place of beginning, as described in the assessment sued on and in the plaintiffs' complaint be and the same is hereby forever barred and foreclosed, and that said real estate and all the rights, title, interest and claim of the defendant and all persons claiming from, under or through him in and to the same shall be sold by the sheriff of the County of Boone and State of Indiana after duly advertising the same in like manner as lands are sold upon executions issued upon judgment at law, such sale to be made without any relief whatever from valuation or appraisement laws, and the proceeds arising from such sale the sheriff is ordered to apply as follows, to-wit:

192

First, to the payment of all costs accrued in this cause and the costs of said sale.

Second, to the payment of the amount due the plaintiff on this judgment with interest thereon as aforesaid.

The overplus, if any, remaining after the payment of the aforesaid judgment, interest, and costs to be paid by the sheriff to the Clerk of this Court for the use of the party lawfully authorized to receive the same.

It is further ordered by the court that a duly certified copy of this decree, under the hand of the Clerk and the seal of this Court, shall be sufficient authority to the sheriff to execute the same. All of which is finally ordered, adjudged and decreed by the Court."

193 No. 199.

"ROBERT L. PORTER, MELVIN L. BOWLIN, CHESTER G. HADLEY
vs.
JOHN T. WALTON.

To Foreclose Street Assessment.

Comes now the plaintiffs by their attorney, and it appearing from the return of the sheriff on the summons issued in this cause that the defendant has been served with said summons more than ten days prior to the date fixed for the return thereof by endorsement on the plaintiffs' complaint, which summons and the return thereon are in the words and figures following, to-wit (Here insert). And said defendant failing to appear and answer the plaintiffs' complaint is three times loudly called in open court and comes not, but wholly makes default herein.

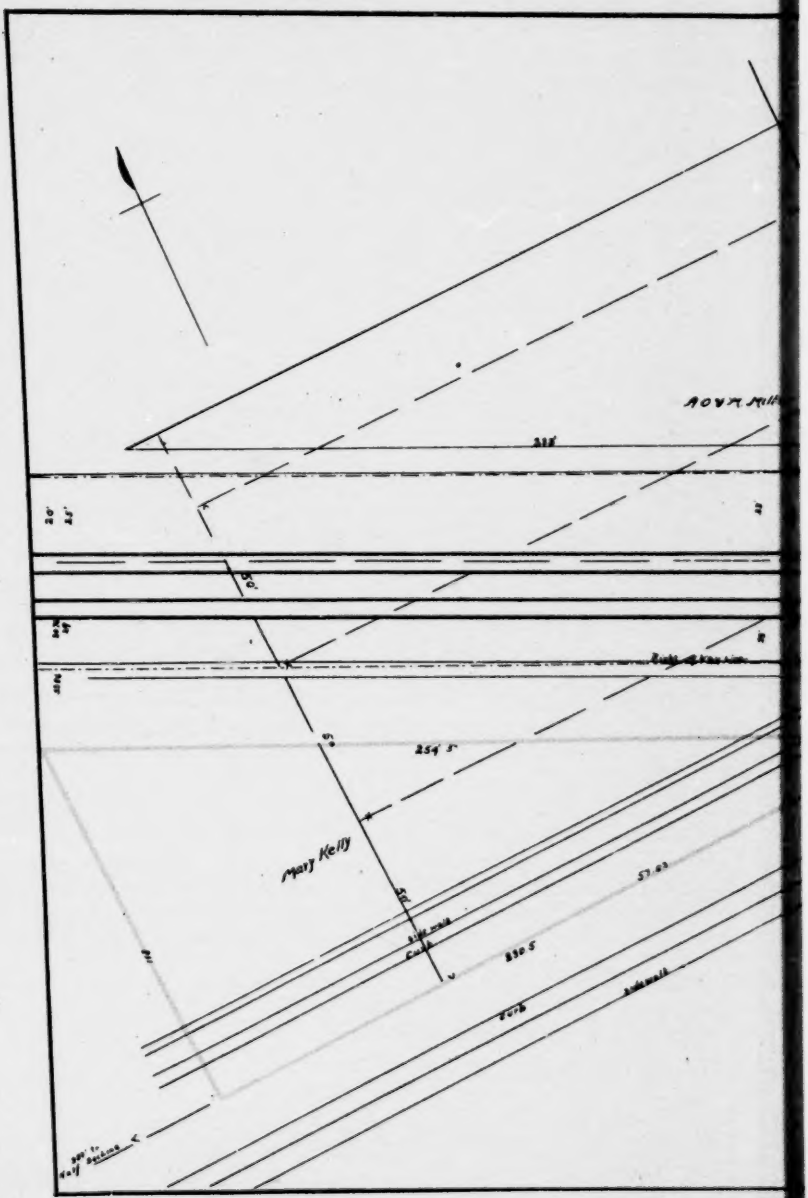
And now this cause is submitted to the Court for trial finding, judgment and decree without the intervention of a jury, and the Court having heard the evidence and being sufficiently advised in the premises finds for the plaintiff-; that the material allegations of the plaintiffs' complaint are true; that there is due the plaintiff upon the assessment sued on the sum of ninety dollars and fifty-nine cents principal and interest, and the further sum of fifteen dollars attorney's fees, and the costs of this action taxed at — dollars and — cents, without ahy relief from valuation or appraisement laws; that the plaintiffs are entitled to foreclosure of the lien of said assessment upon the real estate described in their complaint and the sale of said real estate to pay said assessment, attorney's fees and costs, which real estate is hereinafter described.

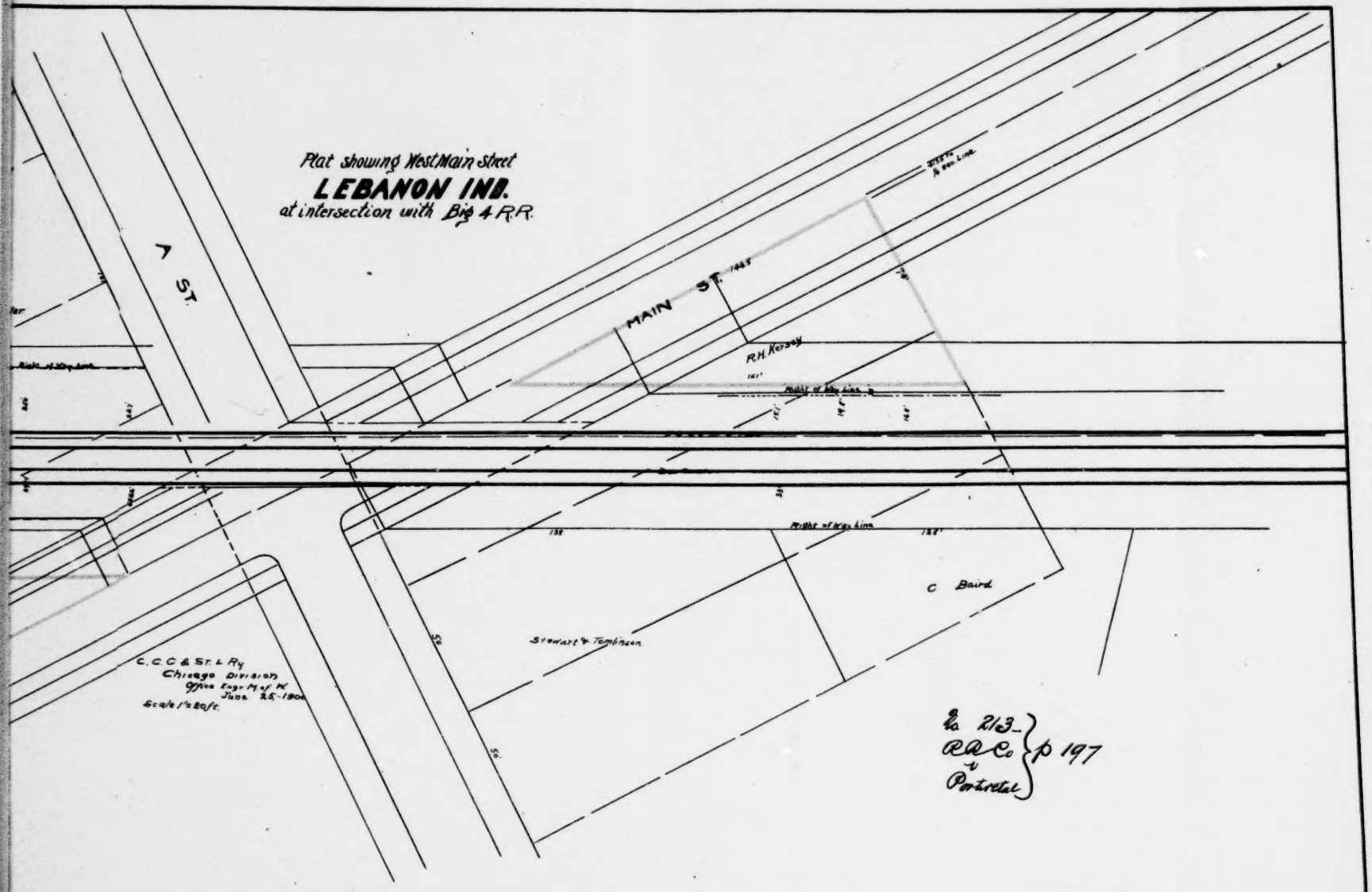
194 It is therefore considered, adjudged and decreed by the Court that the plaintiffs recover of and from the defendant, John T. Walton the sum of one hundred and five dollars and fifty-nine cents their damages assessed by the Court as aforesaid, and also their costs and charges in this behalf laid out and expended, taxed at — dollars and — cents, without any relief whatever from valuation or appraisement laws.

The judgment to bear interest at the rate of six per cent. per annum from the rendition thereof until paid.

And it is further considered, adjudged and decreed by the court that the equity of redemption of the defendant and all persons claiming under, from and through him in and to said real estate, to-wit: commencing in the center of Crawfordsville State Road twelve rods west of the east line of the southwest quarter of the northeast quarter of section thirty-six in township nineteen north, range one west, thence south forty-nine and one half degrees west one hundred and twelve and one-half feet, thence north seventy-one and one half feet, thence north eighty-nine degrees east eighty-five and one half feet with the center of said road to the beginning, containing seven hundredths of an acre, all in the City of Lebanon,

Porter v. B. C. C. & St. L. Ry. Co.
Plat marked Ex. No. 4 –




Plat showing West Main Street
LEBANON IND.
at intersection with Big 4 R.R.
A ST.
MAIN ST.
R.H. Kersey
Right of Way Line
C Baird
Stewart & Tomlinson
C. C. C. & St. L. Ry
Chicago Division
Office Engr. M of W
June 25-1904
Scale 1"=80 ft.
Va 213
R&Co
v
Portertal
p 197

Boone County, Indiana, and described in the assessment sued on and in the plaintiffs' complaint be and the same is hereby forever barred and foreclosed, and that said real estate and all the rights, title, interest and claim of the defendant and all persons claiming from, under or through him in and to the same shall be sold by the sheriff of the County of Boone in the State of Indiana, after duly advertising the same in like manner as lands are sold upon execution issued upon judgments at law such sale to be made without any relief whatever from valuation or appraisement laws, and the proceeds arising from such sale the sheriff is ordered and directed to apply as follows to-wit:

195 First, to the payment of all costs accrued in this cause and the costs of said sale.

Second to the payment of the amount due the plaintiff- on this judgment with interest thereon as aforesaid.

The overplus, if any, remaining after the payment of the aforesaid judgment, interests and costs, to be paid by the sheriff to the Clerk of this Court for the use of the party lawfully authorized to receive the same.

It is further ordered by the court that a duly certified copy of this decree under the hand of the clerk and the seal of this Court shall be sufficient authority to the sheriff to execute the same.

All of which is finally ordered, adjudged and decreed by the Court."

Cross-examination.

Questions by L. J. HACKNEY, Esq.:

Q. The two records you have just referred to are of the decrees in the foreclosure proceedings, the papers in which were here and introduced a while ago?

A. Yes, sir.

Witness excused.

Senator GIFFORD: Now, we withdraw all the papers that were introduced in Cause No. 199.

Whereupon the plaintiffs rest.

And the defendant, to maintain the issues on its behalf, offered and introduced the following evidence, to-wit:

Judge HACKNEY: Now, may the Court please, I introduce in evidence this plat that has been used and referred to. The

196 said plat was admitted in evidence and marked "Exhibit No. 4," the same being in the words, lines, letters and figures following, to-wit:

DEF'T'S EXHIBIT No. 4.

(Here follows plat marked page 197.)

198 *Bill of Exceptions.*

Direct Examination of Hadley Baldwin.

HADLEY BALDWIN, a witness for the defendant being first duly sworn, testified as follows:

Examination in chief.

Questions by Judge L. J. HACKNEY:

Q. State your name?
A. Hadley Baldwin.
Q. Mr. Baldwin, are you acquainted with the location of Main street and A street and the crossing of the two streets by the right of way of the defendant railway company in Lebanon?
A. Yes, sir.
Q. Are you acquainted with the location of the tract known as the Kersey tract?
A. Yes, sir.
Q. I will ask you to state whether or not the improvement of Main street along the line of the Kersey tract was of any benefit to the property and right of way of the defendant railway company immediately back from the Kersey property?

Senator GIFFORD: To which question, may the Court please, the plaintiffs object, for the reason that they are bound by the record. It is not only *prima facie*, but it is final on a collateral attack. The finding and decision of the Board is conclusive.

Judge HACKNEY: We offer to prove, may the Court please, in answer to this question that the improvement was not and could not have been beneficial to the property and right of way of the defendant; did not and could not have increased its value directly or indirectly.

The Court sustained the objection, excluding the evidence so offered;

To which ruling of the Court, the defendant, by counsel, at the time excepted.

199 Q. I will ask you to state whether or not the improvement of Main street along the line of what has been called here the Kersey property, and as indicated by the map in evidence, did or could, in any way, have increased the value of the right of way and the property of the defendant railway company?

Senator GIFFORD: The plaintiffs object to that question, if the Court please, for the reasons already stated, that they are bound by the record; that it is not only *prima facie* but it is final on a collateral attack, and that the findings and decision of the Board is conclusive.

Judge HACKNEY: And we offer to prove, may the Court please, in answer to this question, that the improvement was not and could not have been beneficial to the property and right of way of the

defendant, and did not and could not have increased its value directly or indirectly.

The Court sustained the objection, excluding the evidence so offered. To which ruling of the Court the defendant, by counsel, at the time excepted.

Witness excused.

Whereupon the defendant rests.

And this was all the evidence given in the cause.

200 STATE OF INDIANA, *County of Marion, ss:*

I, William S. Garber, Official Reporter of the Marion Circuit Court, of Marion County, Indiana, duly appointed and qualified, hereby certify That upon the trial of this cause wherein Robert L. Porter, *et al.* are plaintiffs, and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company is Defendant, I took down in shorthand all of the oral evidence given, including both questions and answers, and the documentary evidence, and noted all of the objections made to the admission of evidence the rulings of the Court as to the admission and rejection of evidence, and the exceptions taken thereto; that having been requested by the defendant to furnish it with a Typewritten Transcript of all of said proceedings, so taken and noted by me upon the trial of said cause, including all documentary evidence, I prepared the foregoing Transcript, and hereby certify That said Transcript contains all the evidence given in said cause, so taken by me upon said trial, at the time and place aforesaid.

WILLIAM S. GARBER,
Official Reporter, Marion Circuit Court,
Marion County, Indiana.

(Filed Sep. 2, 1903
WM. E. DAVIS, *Clerk.*)

201 STATE OF INDIANA, *County of Marion, ss:*

I, William E. Davis, Clerk of the Marion Circuit Court of Marion County, Indiana, do hereby certify That the foregoing Typewritten Transcript was filed in my office by William S. Garber, Official Reporter of said Court, on the 22nd day of September 1903.

Witness my hand and the seal of said court, this 22nd day of September 1903.

WILLIAM E. DAVIS, *Clerk.*

(Filed Sep. 2, 1903.
WM. E. DAVIS, *Clerk.*)

And be it further remembered That the above and foregoing Typewritten Transcript of the evidence, so taken reported and filed as aforesaid, contains all the evidence given in said cause, with the objections thereto, the rulings of the Court on such objections, and such exceptions taken thereto, and the same is ordered to be certified to, without copying, as a part of the Record of this cause.

And on the 22nd day of September, 1903, the defendant tendered this, its *bill of exceptions,* and prayed that the same might be signed,

sealed and made a part of the Record in this cause; which is accordingly done, this 23rd day of September, 1903, and within the time heretofore allowed by the court.

HENRY CLAY ALLEN,
Judge Marion Circuit Court.

(Filed Sep. 23, 1903.
WM. E. DAVIS, *Clerk.*)

202 And afterwards, to-wit: on the 29th day of September 1903, being the 26th Judicial day of the said September term of this court, before the same Hon. Judge, the following proceedings were had herein.

"Come the defendant Railway Company by counsel and files its *appeal bond* herein which bond is approved by the court and is as follows:

Appeal Bond—Supreme Court.

Know all men by these presents, That we, the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., as principal and the Federal Union Surety Company, as surety, are held and firmly bound unto Porter, *et al.* in the penal sum of Fifteen Hundred ($1500.00) Dollars to the payment of which, well and truly to be made and done, we bind ourselves our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of September, 1903.

The condition of the above obligation is such, that whereas, heretofore, to-wit: On the 3rd day of June 1903, the said Porter, *et al.*, in the Marion Circuit Court recovered a judgment against the said Clevelahd, Cincinnati Chicago & St. Louis Railway Company for the sum of Fifteen Hundred ($1500.00) Dollars in damages and costs of suit, etc. from which said judgment of said Marion Circuit Court the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company appeal to the Appellate Court of Indiana.

Now if the said Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. shall well and truly prosecute said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against it, then the above obligation to be null and void, otherwise
203 to be and remain in full force and virtue in law.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY,
By JNO. F. DYE, *Gen'l Counsel.* [SEAL.]

FEDERAL UNION SURETY COMPANY,
By HUGH DAUGHERTY, *President.*

Attest:
E. M. JOHNSON *Secretary.*

Approved by the Court this September 29th, 1903.

HENRY CLAY ALLEN, *Judge.*

204 *Præcipe.*

SEPT. 26TH, 1903.

To the Clerk of the Marion Circuit Court:

You will please return transcript for appeal to the Appellate Court of Indiana in the case of Porter *v.* C. C. C. & St. L. Ry. Co., No. 10582 and include therein;

1st. All of the files not superseded by amendment;

and. All of the record entires, and other proceedings had;

3rd. And the original bill of exceptions, containing the longhand manuscript of the evidence taken up on the trial.

Yours truly, L. J. HACKNEY,
Att'y for C. C. C. & St. L. Ry. Co.

205 STATE OF INDIANA, *County of Marion, ss:*

I, William E. Davis, Clerk of the Circuit Court within and for the county of — aforesaid, do hereby certify that the foregoing transcript contains full, true and complete copies of all the entires of proceedings had, and of all the papers filed in said Court, in cause numbered 10,583, as appear from the records and files thereof now in my custody.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Circuit Court at Indianapolis, this 17th day of October, 1903.

[SEAL.] WM. E. DAVIS, *Clerk.*

206 In the Appellate Court of Indiana.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RY. COMPANY, Appellant,
vs.
ROBERT L. PORTER, CHESTER G. HADLEY, MELVIN L. BOWLIN, Appellees.

Assignment of Errors.

(Filed Nov. 17, 1903. R. A. Brown, Clerk.)

The Appellant, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, for its assignment of errors herein says, that there is manifest error disclosed in and by the record herein in each of the rulings of the lower court as hereinafter severally stated, to-wit:

First. The Marion Circuit Court erred in overruling motion of the appellant, the defendant in said court, to require a consolidation of the two paragraphs of amended complaint, and the causes of action therein stated.

Second. The Marion Circuit Court erred in overruling the demurrer of the appellant, defendant in said court, to the first paragraph of amended complaint.

Third. The Marion Circuit Court erred in overruling the demurrer of the appellant, defendant in said court, to the second paragraph of amended complaint.

Fourth. The first paragraph of amended complaint did not state facts sufficient to constitute a cause of action against the appellant.

Fifth. The second paragraph of amended complaint did not state facts sufficient to constitute a cause of action against the appellant.

Sixth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the third paragraph
207 of answer of the appellant, defendant below, to the amended complaint.

Seventh. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the fourth paragraph of answer of the appellant to the first paragraph of amended complaint.

Eighth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs, below, to the fifth paragraph of answer of the appellant to the first paragraph of amended complaint.

Ninth. The Marion Circuit Court erred in sustaining the demurrerr of the appellees, plaintiffs below, to the sixth paragraph of answer of the appellant to the first paragraph of amended complaint.

Tenth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the seventh paragraph of answer of the appellant to the first paragraph of amended complaint.

Eleventh. The Marion Circuit Court erred in overruling the demurrer of the appellees, plaintiffs below, to the fourth paragraph of answer of the appellant to the second paragraph of amended complaint.

Twelfth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the fifth paragraph of answer of the appellant to the second paragraph of amended complaint.

Thirteenth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the sixth paragraph of answer of the appellant to the second paragraph of amended complaint.

Fourteenth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the fifth para-
208 graph of answer of the appellant to the second paragraph of amended complaint.

Thirteenth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the sixth paragraph of answer of the appellant to the second paragraph of amended complaint.

Fourteenth. The Marion Circuit Court erred in sustaining the demurrer of the appellees, plaintiffs below, to the seventh paragraph of answer of the appellant to the second paragraph of amended complaint.

Fifteenth. The Marion Circuit Court erred in its conclusion of law upon the special findings of fact.

Sixteenth. The Marion Circuit Court erred in overruling the motion of the appellant for a new trial.

Seventeenth. The Marion Circuit Court erred in overruling the motion of the appellant to modify the decree and judgment.

Eighteenth. The Marion Circuit Court erred in its first conclusions of law upon the facts specially found.

Nineteenth. The Marion Circuit Court erred in its second conclusion of law upon the facts specially found.

Twentieth. The Marion Circuit Court erred in its third conclusion of law upon the facts specially found.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
L. J. HACKNEY, *Att'y for Appellant.*

209 And afterwards, to-wit: on the 17th day of December, 1903, the same being the 22nd Judicial Day of the November Term 1903 of said Appellate Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by their counsel, and this cause is submitted to the court for judgment and decree, as provided by the Act of the General Assembly of the State of Indiana, approved April 13, 1885, and the Rules of said Appellate Court adopted in relation thereto.

And afterwards, to-wit: On January 4, 1904, comes the appellant, by counsel, and files eight copies of its brief herein, which said brief is in the words and figures following: (Here insert.)

And afterwards, to-wit: On February 12, 1904, come the appellees, by counsel, and file their motion, notice and affidavit for a Writ of Certiorari herein, which said motion is in the words and figures following: (Here insert.)

210 And afterwards, to-wit: On February 15, 1904, comes the appellant, by counsel, and files its objections to appellees' motion for a Writ of Certiorari herein, which said objections are in the words and figures following: (Here insert.)

211 And afterwards, to-wit: On February 17, 1904, the same being the 75th Judicial Day of the November Term 1903 of said Appellate Court, come the parties by counsel, and the Court being advised in the premises, overrules appellees' motion for a Writ of Certiorari herein.

And afterwards, to-wit: On March 1, 1904, come the appellees, by counsel, and file their petition for additional time to file their brief herein.

And the Court being advised in the premises, grants appellees' petition for additional time to file their brief herein, and sixty days additional time is given.

And afterwards, to-wit: On May 11, 1904, come the appellees, by counsel, and file eight copies of their brief herein, which said brief is in the words and figures following: (Here insert.)

And afterwards, to-wit: On May 11, 1904, come the appellees, by counsel, and file their motion and notice for a Writ of Certiorari herein, which said motion is in the words and figures following: (Here insert.)

212 And afterwards, to-wit: On May 23, 1904, comes the appellant, by counsel, and files eight copies of its Reply Brief herein, which said Reply Brief is in the words and figures following: (Here insert.)

And afterwards, to-wit: On June 2, 1904, the same being the 10th Judicial Day of the May Term 1904 of said Appellate Court, the following further proceedings were had herein:

Come the parties by counsel, and the Court being advised in the premises, grants appellees' motion for a Writ of Certiorari herein, and the same is issued accordingly.

And afterwards, to-wit: On June 3, 1904, the Clerk of the Marion Circuit Court files herein his Return to the Writ of Certiorari herefore issued herein, which said return is in the words and figures following, to-wit:

213 Marion Circuit Court.

Leonard M. Quill, Cashier. William E. Davis Clerk.

INDIANAPOLIS, *June* 2, 1904.

Respectfully transmitted to the Appellate Court, being part of the Transcript in Cause numbered 10,583; as commanded by the Marion Circuit Court. See page 41 of the Bill of Exceptions herewith.

WM. E. DAVIS,
Clerk Marion Circuit Court.

(Filed June 3 1904.
R. A. BROWN, *Clerk.*)

214 *Stenographer's Transcript.*

STATE OF INDIANA, *County of Marion:*

In the Marion Circuit Court, May Term, 1904, Honorable Henry Clay Allen, Judge.

No. 10583.

ROBERT L. PORTER, CHESTER G. HADLEY, and MELVIN L. BOWLIN
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

On Motion for *Nunc pro Tunc* Entry.

(Filed May 27, 1904. Wm. E. Davis, Clerk.)

Bill of Exceptions.

Appearances.

For Plaintiffs, Geo. H. Gifford, Esq.
For Defendant, L. J. Hackney, Esq.

W. S. Garber. Walter N. Carpenter.

Garber & Carpenter,

Stenographers and Law Reporters,

(Official Reporters Marion County Courts,)

Room 51 Court House,

Indianapolis, Indiana.

(O. K.
GIFFORD & GIFFORD. 5-22, 1904.)

215 *Index.*

Witnesses.	Direct.	Cross.	Redirect.	Recross.
Plaintiff's evidence:				
Estimate from page 130 of Original Bill of Exceptions.....				
Amended complaint, with file marks.				
Transcript on Change of Venue...				
Artman, Samuel R.....				

216 STATE OF INDIANA, *County of Marion, ss:*

In the Marion Circuit Court, May Term, 1904, Honorable Henry Clay Allen, Judge.

(Filed May 27, 1904. Wm. E. Davis, Clerk.)

No. 10583.

ROBERT L. PORTER, CHESTER G. HADLEY, MELVIN L. BOWLIN,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

On Motion for *Nunc pro Tunc* Entry.

Bill of Exceptions.

Be it remembered, That on the 2nd day of May, the same being the first juridical day of the May Term, 1904, of the Marion Circuit Court, of Marion County, State of Indiana, the following proceedings were had in the above entitled cause, before the Honorable Henry Clay Allen, Judge of said Court, to-wit:

The cause being at issue, the same came on for trial before the Court, without the intervention of a jury, George H. Gifford, Esq., appearing as counsel for the Plaintiffs, and L. J. Hackney, Esq., appearing as counsel for the Defendant.

And be it further remembered, That before the trial was begun, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present Walter N. Carpenter, Official Reporter of said Court, to take down in shorthand, the oral evi-
217 dence, including both questions and answers, and note all rulings of the Judge in respect to the admission and rejection of evidence, and the objections and exceptions thereto, and the documentary evidence, on the trial of said cause, the said Walter N. Carpenter having been, at the time of his appointment, duly sworn to faithfully perform his duties as such Official Shorthand Reporter, which said appointment and his official oath as such reporter, are of and among the records of said Court.

And be it further remembered, That said official reporter was present and took down in shorthand the oral and documentary evidence given upon the trial of said cause, including both questions and answers, and noted all of the objections made to the admission of evidence, all of the rulings of the Court with respect to the admission and rejection of evidence, and the exceptions taken thereto.

And the defendant having requested said official reporter to furnish it with a complete transcript of said evidence, objections, rulings of the Court thereon, and the exceptions taken thereto, including all documentary evidence, a Typewritten Transcript of the same was made by said official reporter, and was by him filed with the Clerk

CHARTS

TOO

LARGE

FOR

FILMING

Names of Owners	Desciption of Property.
John T. Walton John T. Walton	
Mary Kelly	Beginning at intersection of North line of Main Street with South Right of way of C.C.C. & St. L. Ry and S 84-37' E. of W. line of S.W. 1/4 of N.E. 1/4 Sec 36 T. 19 N.R. 1 W. thence West

LOT	BLOCK	ADDITION OR SUB DIVISION	No of feet front	PRICE OF PAVING PER LINEAL FOOT	AMOUNT	No. LINEAL FEET OF CURBING	PRICE OF CURBING PER LINEAL FOOT	AMOUNT	No. FEET OF SIDEWALK	PRICE PER FOOT	AMOUNT	No. FEET FRONT	CATCH BASIN PER LINEAL FOOT	AMOUNT	AMOUNT OF GRAVEL CREDIT	AMOUNT OF CERTIFICATE PAYMENT	AMOUNT OF BOND PAYMENT WITH 14 PER CENT DEDUCTED	AMOUNT OF CASH PAYMENT WITH 14 PERCENT AND TEN AT PERCENT DEDUCTED.
			24.00	2.40	57.60	24.00	5.05	12.12	24.00	.85	20.40	24.00	.0252	.67	1.03	89.76	77.20	73.24
			72.14	2.40	177.13	72.14	5.05	36.43	72.14	.85	61.31	72.14	.0252	2.03	3.12	272.78	235.46	223.69
			157.37	2.40	377.69	157.37	5.05	79.47	157.37	.85	133.76	157.37	.0252	4.44	6.80	588.56	506.17	480.87

of the Marion Circuit Court, of Marion County, State of Indiana, on the 27th day of May, 1904; which typewritten transcript is in the words and figures following,

That is to say:

218 The plaintiffs, to maintain the issues on their behalf, offered and introduced the following evidence, towit:

Mr. GIFFORD: Your Honor, we offer in evidence the estimate appearing at page 130 of the Bill of Exceptions now in the record in the above entitled cause, which is Cause Number 5069 in the Appellate Court of the State of Indiana, formerly Cause Number 10583, of the files of the Marion Circuit Court, including the file marks thereon.

The said estimate, so offered, was admitted and read in evidence, and is in the words and figures following, towit:

(Here follows estimate marked pp. 218½ to 220.)

[Endorsed on the back of estimate sheet.]

(Endorsement:) No. 10583. In the Boone Circuit Court, April Term, 1898. Robert L. Porter, Chester G. Hadley, Melvin L. Bowlin *vs.* The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. Exhibit "A" filed with First and Second Paragraphs of Complaint. Filed May 26, 1898. Oliver P. Worley, clerk Boone Co. Circuit Court. Filed Oct. 11, 1900. Geo. B. Elliott, clerk. Samuel R. Artman, att'y for Plaintiff.

printed and published in said city, and the City Clerk did give such notice as directed by said Common Council; that said Committee on Streets and Alleys made report to said Common Council on the 14th day of January, 1897, recommending that the estimate of the costs of said improvement be amended and modified as shown in corrected estimate filed with said report, and recommending that the several amounts set out in said report be assessed against the several lots and parcels of ground respectively abutting on said street as therein set out and described, a copy of which corrected and amended estimate report is filed herewith, made a part hereof and marked "Exhibit A."

That said Common Council, on the 14th day of January, 1897, by a two-thirds vote of all its members adopted the report of said Committee on Streets and Alleys and assessed against the lots and parcels of land respectively abutting on said street, as described in said corrected estimate report, the several amounts as therein set out; that one Mary Kelley was at that time the owner of the following described unplatted land lying within the corporate limits of the said City of Lebanon, Indiana, and abutting upon the street improved, to-wit: Commencing in the center of the Crawfordsville road 380 feet east of the west line of the southwest quarter of section 36 in township 19 north, range one west, thence east 230 feet to
226 the right of way of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, thence northwest with said right of way and on the south side thereof 254 feet and five inches, thence south 113 feet to the place of beginning.

That said above described real estate was assessed by the Common Council of the City of Lebanon, Indiana, for the improvement of said street, the sum of $588.56, on the 14th day of January, 1897. That the said Mary Kelley for more than twenty days after the making of said assessment, wholly failed and refused to pay said assessment and did not within two weeks after the making of said assessment, make application in writing as provided by law for the privilege of paying said assessment in ten annual installments. That on the 4th day of March, 1897, said assessment was past due and wholly unpaid, and on said date these plaintiffs filed in the circuit court of Boone County, Indiana, their complaint against the said Mary Kelly and Patrick Kelly, her husband, to foreclose the lien of said assessment against said real estate.

That summons was issued and served upon the said defendants, Mary Kelly and Patrick Kelly, in the proceedings as provided by law and such proceedings were had herein, that on the 16th day of March, 1897, the Boone Circuit Court rendered judgment against said defendants, foreclosing the lien of said assessment, as against said real estate for the amount of said assessment and eight dollars and fifty-seven cents interest accrued to that date, and sixty-five dollars attorney's fees, making a total of six hundred and fifty-two dollars and thirteen cents. That the costs in said proceeding, including costs of sale, amounted to twenty-five dollars and eighty-five cents.

That said real estate was properly advertised for sale by the
227 sheriff of Boone county, Indiana, and sold on the 24th day of April, 1897, as required by law at public outcry at the Court

House door in the said City of Lebanon, to one Smith F. Cox, for the sum of seventy-five dollars, which was the fair cash value of said real estate at said time. That four dollars and nineteen cents interest had accrued on said judgment from the date of its rendition to the date of sale, making the total amount then due, not including costs, the sum of six hundred fifty-six dollars and thirty-two cents. That there is now due and owing to the plaintiffs this amount, less the sum of seventy-five dollars, the amount for which said real estate was sold, leaving now due and owing to these plaintiffs, the sum of five hundred, eighty-one dollars and thirty-two cents, together with interest thereon at the rate of six per cent. per annum from the twenty-fourth day of April, 1897. That the defendant railway company is now and was, at the date of the assessment for the improvement of said street, the owner of a parcel of real estate within the corporate limits of said City, lying adjacent and contiguous to the real estate herein described as belonging to the said Mary Kelly, and which real estate of the defendant railway company lies immediately back of said real estate of the said Mary Kelly from the street so improved; that is, the real estate of the said Mary Kelly is situate immediately between the street improved and the parcel of real estate owned by the defendant railway company, and there is and was, at the time of said assessment, no other real estate abutting upon the street so improved immediately in front of the parcel of real estate owned by the defendant railway company, which real estate is within one hundred and fifty feet of the line of street so improved, and is described as follows, to-wit: Commencing at the northwest corner of the
228 real estate of the said Mary Kelly, thence north sixty-two feet, thence east parallel with said Crawfordsville road 24 2/10 feet to a point 33 feet north of the center of the Cleveland, Cincinnati, Chicago and St. Louis Railway, thence south 63½ degrees east, 171 4/10 feet on a line parallel with and 33 feet north of the center of the said railway, thence south 70 3/10 feet to the north side of Main street, at its intersection with the south line of the right of way of said railway, thence north 63½ degrees west with the south line of said right of way, 198½ feet to the point of beginning.

That the plaintiffs have demanded of the defendant railway company, the payment of said balance due on said assessment and the defendant has refused and failed to pay the same or any part thereof; but denies its liability therefor. That sixty-five dollars, the attorney fee allowed by the court in the foreclosure of the lien of said assessment against the real estate owned by the said Mary Kelley was a fair, just and reasonable attorney's fee for said services. That there is now due to the plaintiff on the balance of said assessment the amount hereinbefore alleged, which is past due and remains wholly unpaid. That the defendant Thomas A. Kersey claims to be the owner of some part of the real estate hereinbefore described as belonging to the railroad company, and is made a party to answer as to his interest therein.

Wherefore the plaintiffs demand judgment against the defendant railway company for the sum of eight hundred dollars, for the fore-

closure of the lien of said assessment against said defendant's real estate herein described and an order for the sale of the same and that if the said Thomas A. Kersey has any interest therein for a judgment of foreclosure against him and for all other proper relief.

229 STATE OF INDIANA, *County of Boone, ss:*

In the Boone Circuit Court, April Term, 1900.

ROBERT L. PORTER, CHESTER G. HADLEY, MELVIN L. BOWLIN, Plaintiffs,

vs.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, ROBERT H. KERSEY and LILLIAN KERSEY, Defendants.

The above named plaintiffs complain of the above named defendants and for a second paragraph of amended complaint say, that the defendant the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, is a railroad corporation, organized and operating under and pursuant to the laws of the State of Indiana and the State of Ohio.

That said defendant is the owner of a line of railway, railroad right of way and several tracts of real estate situate in the corporate limits of the City of Lebanon, Indiana. That the City of Lebanon in Boone County in the State of Indiana, is a municipal corporation; that the Common Council of the said city of Lebanon, Indiana, by a two-thirds vote of all its members on the 27th day of January, 1896, adopted a declaratory resolution for the improvement of West Main street in said city from the west corporation line to the west side of Lebanon street, providing for grading and paving the same and constructing sidewalk and lawns, and that said Common Council in said declaratory resolution fixed the 24th day of
230 February, 1896, and the Council Chamber of said City as the time and place when and where persons interested in said proposed improvement might appear before said Common Council and object to the improvement of said street; that said Common Council in said resolution directed the Clerk of said City to give ten days' notice by two weeks' publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, of the time and place of hearing such objections; that the Clerk of said City did give ten days' notice by two weeks' publication in the Lebanon Patriot aforesaid, of the time and place when and where persons interested in said improvement might appear before said Common Council and object to the making of said improvement; that on the 16th day of April, 1896, the Common Council of said city, by a two-thirds vote of all its members, adopted a special ordinance ordering the improvement of West Main street in said city from the west corporation line to the west side of Lebanon street in the manner provided in the declaratory resolution aforesaid, and fixing in said ordinance the 18th day of May, 1896, as the date

for receiving bids for the construction of said improvement and directing the Clerk of said City to give three weeks' notice by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city of the time and place fixed for receiving such bids; that the Clerk of said City did give three weeks' notice by publication in the aforesaid Lebanon Patriot for three weeks of the time and place when and where the Common Council of said City would receive bids for the construction of said improvement. That on the said 18th day of May, 1896, six separate bids were filed for the construction of said improvement, that the Common Council of said City rejected all of said bids as being excessive and ordered the Clerk of said City to again give three weeks' notice by
231 publication in the aforesaid Lebanon Patriot that said Common Council would receive bids for the construction of said improvement on the 24th day of June, 1896, the City Clerk of said City did give notice by three weeks publication in the aforesaid Lebanon Patriot that the Common Council of said City would receive bids for the construction of said improvement on the 24th day of June, 1896; that upon the said 24th day of June, 1896, five separate bids for the construction of said improvement were filed before said Common Council; that the plaintiffs herein, as partners in the style and firm name of Porter, Bowlin and Hadley, filed before said Common Council a bid for the construction of said improvement; that after mature consideration, the Common Council of said city accepted the bid of the plaintiffs herein for the improvemen of said street and awarded them the contract therefor; and upon the 24th day of June, 1896, the plaintiffs herein entered into a formal contract with said City for the improvement of said street and gave bond for the faithful discharge of said contract as provided by law; that pursuant to the term of said contract, the plaintiffs entered upon the construction of said improvement and fully completed the same in accordance with said contract and the specifications therefor, prior to the 14th day of December, 1896; that on the 14th day of December, 1896, the Common Council of said city accepted said improvement as fully completed, according to the contract and specifications therefor, and made an order directing the City Civil Engineer of said city to prepare and file an estimate of the cost and expenses of said improvement as provided by law; that on the said 14th day of December, 1896, the City Civil Engineer of said city filed before said Common Council, his estimate of the cost and expenses of constructing said improvement, which
232 estimate was on said date referred by said Common Council to its Committee on Streets and Alleys, which Committee was then and there appointed for that purpose, and said Common Council, fixed the 4th day of January, 1897, and the Council Chamber of said City as the time and place for the meeting of said Committee to consider said report and directed the City Clerk to give two weeks' notice of the time and place of the meeting of such Committee by publication in the Lebanon Patriot, a weekly newspaper printed and published in said city, and the City Clerk did give such notice as directed by said Common Council; that said Committee

on Streets and Alleys, made report to said Common Council on the 14th day of January, 1897, recommending that the estimate of the costs of said improvement be amended and modified as shown in corrected estimate filed with said report and recommending that the several amounts set out in said report be assessed against the several lots and parcels of ground respectively abutting on said street as therein set out and described, a copy of which corrected and amended estimate report is filed herewith, made a part hereof and marked "Exhibit A."

That said Common Council on the 14th day of January, 1897, by a two-thirds vote of all its members, adopted the report of said Committee on Streets and Alleys and assessed against the lots and parcels of land respectively abutting on said street as described in said corrected estimate report, the several amounts as therein set out; that one John T. Walton was at that time, the owner of the following described unplatted land lying within the corporate limits of the said City of Lebanon, Indiana, and abutting on the street improved, towit: Commencing in the center of the Crawfordsville state road
413½ feet west of the east line of the southwest quarter of the northeast quarter of section 36 township 19 north, range
233 one west, thence south 74 feet, thence north 63½ degrees west 161 feet, thence north 89 degrees east 144½ feet with the center of said Crawfordsville road to the place of beginning, containing 12/100 acres, more or less.

That said above described real estate was assessed by the Common Council of the City of Lebanon, Indiana, for the improvement of said street, the sum of two hundred and seventy-three dollars and seventy-three cents on the 14th day of January, 1897. That the said John T. Walton, for more than twenty days after the making of said assessment wholly failed and refused to pay said assessment and did not within two weeks after the making of said assessment, make application in writing, as provided by law, for the privilege of paying said assessment in ten annual installments. That on the 4th day of March, 1898, said assessment was past due and wholly unpaid, and on said date, these plaintiffs filed in the Circuit Court of Boone county, Indiana, their complaint against the said John T. Walton, to foreclose the lien of said assessment against said real estate.

That summons was issued and served on the said John T. Walton in said proceeding as provided by law and such proceedings were had therein, that on the 17th day of March, 1897, the Boone Circuit Court rendered judgment against said defendant, foreclosing the lien of said assessment as against said real estate for the amount of said assessment and four dollars and ten cents interest accrued to that date and thirty-five dollars attorney's fees, which was a reasonable attorney's fee for said services, making a total of three hundred twelve dollars and eighty-eight cents. That the costs of said proceeding including costs of sale, amounts to twenty-four dol-
234 lars and sixty-eight cents. That said real estate was properly advertised for sale by the Sheriff of Boone County, Indiana, and by him sold on the 24th day of April, 1897, as required by

law, at public outcry at the Court House door in the said City of Lebanon, to one Robert Kersey, for the sum of twelve dollars, which was the fair cash value of said real estate at that time.

That one dollar and ninety-two cents interest had accrued on said judgment from the date of its rendition to the date of sale, making the total amount then due, not including costs, the sum of three hundred fourteen dollars and eighty cents. That there is now due and owing to the plaintiffs on said assessment this amount less the sum of twelve dollars, the amount for which said real estate was sold, leaving now due and owing to these plaintiffs on said assessment, the sum of three hundred two dollars and eighty cents, together with interest thereon at the rate of six per cent. per annum from the 24th day of April, 1897. That the defendant railway company is now and was, at the date of making the assessment for the improvement of said street, the owner of a parcel of real estate within the corporate limits of said city lying adjacent and contiguous to the real estate herein described as belonging to the said John T. Walton, and which real estate of said defendant lies immediately back of said real estate of the said John T. Walton from the street so improved, that is, the real estate of the said John T. Walton is situated immediately between the street improved and the parcel of real estate owned by the defendant railway company and there is and was, at the time of said assessment no other real estate abutting on the street so improved immediately in front of the parcel of real estate owned by the said defendant railway company, which real estate is within one hundred and fifty feet of the line of the
235 street so improved and is described as follows, towit: Commencing at a point 413½ feet west and 73 feet south of a point where the center line of the Crawfordsville road intersects the east line of the southwest quarter of the northeast quarter of section thirty-six, township nineteen north, range one west, and run south 53½ feet to a point 33 feet south of the center of the C. C. C. & St. L. Ry. right of way; thence north 63½ degrees west on a line parallel with and 33 feet south of the center of said right of way, a distance of 105½ feet, thence north 53½ feet to the south side of Main street; thence south 63½ degrees east 10½ feet to the point of beginning.

That the plaintiffs have demanded of the defendant railway company the payment of said balance due on said assessment and said defendant has refused and failed to pay the same or any part thereof. That there is now due and owing to the plaintiffs on the balance of said assessment the amount hereinbefore alleged, which is past due and remains wholly unpaid. That defendant, Robert H. Kersey claims an interest in and to said real estate described as belon-ing to the defendant railway company and is made a party defendant to answer as to his interest therein. That the defendant Lillian Kersey is the wife of the said Robert H. Kersey and is made a party defendant for that reason.

Wherefore the plaintiffs demand judgment against the defendant railway company for five hundred dollars, for the foreclosure of the lien of said assessment against the said defendant's real estate and an order for the sale of the same, and if the said Robert H. Kersey

is found to have any interest therein, a judgment of foreclosure against him and his said wife, Lillian Kersey, and for all other proper relief.

SAMUEL R. ARTMAN,
Attorney for Plaintiffs.

236 (Endorsement:) No. 10583. In the Boone Circuit Court. September Term 1900. Robert L. Porter, Chester G. Hadley and Melvin L. Bowlin, *vs.* The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, *et al.* First and second paragraphs of Amended Complaint. Filed Oct 11 1900 Geo. B. Elliott Clerk. Filed Sep 5 1900 Oliver P. Worley Clerk B. C. C. Samuel R. Artman Att'y for Plaintiffs.

237 Mr. GIFFORD: Now I offer in evidence the Transcript, together with the file mark thereon, in this Cause No. 10583, which certified it from the Boone Circuit Court on change of venue to the Marion Circuit Court.

The said Transcript, with the file mark thereon, so offered, was admitted and read in evidence, was marked "Exhibit No. 2," and is in the words and figures following, to-wit:

Pleas and proceedings had in the Boone Circuit Court, at a regular Term, begun, held and continued in the Court House in the City of Lebanon, on the First Monday in April, 1898, before the Honorable Barton S. Higgins, sole Judge of said Court in the case of—

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C., & ST. L. RY. CO.

To Foreclose Street Assessment.

Be it remembered that on the 26th day of May, 1898, the above named plaintiffs, by their attorney, S. R. Artman, filed in the office of the Clerk of the Boone Circuit Court, their complaint to foreclose street assessment, against the above named defendant, (said complaint is herewith transmitted,) and upon the filing of said complaint and precipe, the Clerk issued summons for the defendant returnable June 13th, 1898.

(Said summons is herewith transmitted.)

238 And afterward towit: On the 5th day of July, 1898, the same being the 80th Judicial Day of the April Term of said court, the following further proceedings were had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C., & ST. L. RY. CO.

To Foreclose Street Assessment.

Comes now the defendant by attorney and files a demurrer to the complaint, which demurrer reads as follows, towit: (H. I.)
(Said demurrer not on file.)

And afterward towit: On October 10, 1898, the same being the 31st Judicial Day of the September Term of said Court, the following further proceedings were had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C., & ST. L. RY. CO.

To Foreclose Street Assessment.

Come now the parties by their attorneys and the court being sufficiently advised in the premises, overrules the defendant's demurrer, to plaintiff's complaint. And the Court rules the defendant to answer by 1st day of November Term, 1898.

239 And afterwards, towit: On November 14th, 1898, the same being the 7th Judicial Day of the November Term of said Court the following further proceedings were had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C., & ST. L. RY. CO.

To Foreclose Street Assessment.

Comes now the defendant by attorneys and files separate demurrers to the first and second paragraphs of complaint, which demurrers reads as follows, towit: (H. I.)
(Said demurrers are herewith transmitted.)

And the Court overrules said demurrers, which ruling is excepted to by the defendant. And the defendant files answer to each paragraph of complaint, which answer reads as follows, towit: (H. I.)
(Said Answer is not on file.)

And afterward, towit: On the 22nd day of November, 1898, the same being the 14th Judicial day of the November Term of said Court the following further proceedings are had before the same Honorable Judge towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C., & ST. L. RY. CO.

To Foreclose Street Assessment.

Come now the plaintiffs by attorney and files separate and several demurrers to the first and 2nd., 3rd., 5th., 6th., & 7th. paragraphs of answer to 1st paragraph of complaint, which demurrer reads as follows, towit: (H. I.)

240 (Said demurrer is herewith transmitted.)
And the plaintiffs also file separate and several demurrers to the 1st. and 2nd. paragraphs of Answer to the 2nd paragraph of complaint, which demurrer reads as follows, towit: (H. I.).
(Said demurrer is herewith transmitted.)

And afterward towit: On the 15th day of March, 1899, the same being the 63rd Judicial day of the January Term of said court, the following further proceedings were had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER, CHESTER G. HADLEY, and MELVIN L. BOWLIN,
vs.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

To Foreclose Street Assessment.

Come now the parties in the above entitled cause, by their attorneys, and the court being sufficiently advised in the premises, sustains the plaintiff's demurrer to the first, second, third, fifth, sixth and seventh paragraphs of the defendant's answer to the first paragraph of the plaintiff's complaint, and also sustains the plaintiff's demurrer to the first and second paragraphs of the defendant's answer to the second paragraph of the plaintiff's complaint; to which ruling of the court the defendant excepts.

241 And afterward towit: On the 18th day of April, 1899, the same being the 14th Judicial Day of the April Term of said Court, the following further proceedings were had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C. & ST. L. RY. CO.

To Foreclose Street Assessment.

Comes now the defendant by attorney and files additional paragraph of answer to the first paragraph of complaint which answer reads as follows, towit: (H. I.)

(Said Answer is herewith transmitted.)

And the defendant files amended answer to the 2nd paragraph of complaint, which answer reads as follows, towit: (H. I.)

(Said Answer is herewith transmitted.)

And afterwards towit: On the 3rd day of May, 1899, the same being the 27th Judicial Day of the April Term of said Court, the following further proceedings are had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C. & ST. L. RY. CO.

To Foreclose Street Assessment.

Come now the plaintiffs by attorney and file a demurrer to the 8th & 9th paragraphs of answer to the first paragraph of complaint. And the plaintiffs file a demurrer to the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th paragraphs of amended answer to the 2nd paragraph of complaint, which demurrers read as follows, towit: (H. I.)

242 (Said demurrers are herewith transmitted.)

And afterward towit: On the 5th day of September, 1900, the same being the 3rd Judicial Day of the September Term of said Court, the following further proceedings were had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C. & ST. L. RY. CO.

To Foreclose Street Assessment.

Come now the plaintiffs by attorney and file an amended complaint herein, making new parties defendant, which complaint reads as follows, towit: (H. I.)

(Said Complaint is herewith transmitted.)

And the Court orders summons issued for the defendants, Thomas A. Kersey, Robert H. Kersey and Lillian Kersey, returnable Sept. 17th, 1900.

And afterward to wit: On the 1st day of October, 1900, the same being the 25th Judicial Day of the September Term of said Court the following further proceedings were had before the same Honorable Judge, towit:

No. 686.

ROBERT L. PORTER ET AL.
vs.
C., C., C. & ST. L. RY. CO. ET AL.

To Foreclose Street Assessment.

Come now the plaintiffs by attorney and it appearing to the Court from the summons issued and the return of the Sheriff endorsed thereon, which summons and return read as follows, towit: (H. I.)

243 (Said Summons is herewith transmitted.)

That the defendants, Thomas A. Kersey, Robert H. Kersey and Lillian Kersey had been duly served with process more than ten days before the same was returnable, and said defendants are each three times audibly called in open court, but come not and herein wholly make default. And the plaintiffs now file a motion and affidavit for a change of venue from the County, which motion reads as follows, towit: (H. I.)

(Said motion is herewith transmitted.)

And the Court being sufficiently advised in the premises, sustains said motion and hereby orders and directs the Clerk of this Court to prepare a transcript of the proceedings had in this cause and transmit the same, together with all papers filed herein, to the Clerk of the Marion Circuit Court of Marion County, Indiana, for trial, within ten days of this date, upon the payment of the costs of change by the plaintiffs herein.

Read and signed in open Court.

BARTON S. HIGGINS, *Judge.*

244 STATE OF INDIANA, *Boone County, ss:*

I, Oliver P. Worley, Clerk of the Boone Circuit Court, hereby certify that the above and foregoing is a true and complete copy of all the proceedings had in the above entitled cause, and that all the papers on file are herewith transmitted.

In witness whereof I have hereunto set my hand and the seal of the Boone Circuit Court, at Lebanon, this 10th day of October, 1900.

[SEAL.] OLIVER P. WORLEY,
Clerk Boone Circuit Court.

(Endorsement:) 10583. Robt. L. Porter *et al. vs.* C. C. C. & St. L. R'y Co. Transcript on Change of Venue from Boone Cir. Ct. Pltff. takes change. Docketed 16 papers. Filed Oct 11, 1900. Geo. B. Elliott Clerk. Transcript.

245 SAMUEL R. ARTMAN, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct examination.

Questions by GEO. H. GIFFORD, Esq.:

Q. You may state your name to the Court.
A. Samuel R. Artman.
Q. What is your profession or business?
A. Attorney.
Q. What relation did you have to the case here known as the case of Robert L. Porter and others against the Big Four Railway Company?
A. I was originally one of the atorneys for the plaintiffs.
Q. Who was it that filed the amended complaint in that case, in the Boone Circuit Court?
A. I did, personally.
Q. You may go ahead in your own way, Judge, and tell the Court what you know concerning the filing of the Exhibit, the Exhibit being a copy of the assessment in that case, upon which the suit was based?
A. Well, I know after the original complaint was filed it became necessary to amend in order to make some new parties, and that was the only object of amending. I prepared the amended complaint and went to the Court Room and obtained leave to file an amended complaint, and I had it noted filed and stated to Judge Higgins, who was presiding at the time, that I desired to file the original Exhibit with the amended complaint, that it was long and it would take quite
246 a good deal of time to make another copy, and whether he made any record of it or not, I don't know, but he stated that it was all right. Following that I carried the amended complaint and all the papers and laid them on the Clerk's Desk to have him mark them filed.
Q. Was this Exhibit placed in the Clerk's hands, along with the Complaint, at the time?
A. Along with the amended complaint, yes, sir.
Q. Tell the Court whether or not that Exhibit that you speak about being turned over to the Clerk at that time, with the amended complaint, as the Exhibit, is the same paper that is filed with the Transcript in the Appellate Court, appearing on page 130 of the Transcript?
A. Well, it is the same paper that appears in that transcript in the Appellate Court.
Q. As the assessment?
A. Yes sir; it is on page 130 of the transcript.

Cross-examination.

Questions by Judge L. J. HACKNEY:

Q. When the original Complaint was filed was this Exhibit to which you refer, attached to that complaint and made a part of it?

A. It was not attached to it—it was filed with it and was referred to as a part of it and filed at the same time.

Q. And that filing consisted of the file mark which is now on the paper?

A. It consisted of the deposit in the Clerk's office.

Q. And that file mark?

A. Yes, and as an evidence of that fact, of course he put the file mark on it.

Q. And with your amended complaint there was no re-filing of that Exhibit, was there?

247 A. Well, I think there was, as I understand it.

Q. That is to say, it wasn't marked filed?

A. Well, I see from an examination of it now, that there was no file mark put on it—yes.

Q. And so far as you know there was no noteing by the judge, of the fact that any Exhibit was filed with the amended complaint?

A. No sir, I think the Judge's minutes were "Amended Complaint filed."

Q. And when the amended complaint was filed, this document was not attached to it in any way?

A. Not fastened to it, no sir.

Q. This conversation you had with Judge Higgins was substantially all the conversation you had with any officer of the Court about filing it, was it?

A. I think so. Immediately following that announcement I carried the papers over and laid them on the Clerk's desk, for him to mark them filed.

Q. But you did not ask the Clerk to mark this particular document filed, did you—this Exhibit?

A. I don't remember that I did or did not.

Witness excused.

And the plaintiffs here rested.

And this was all the evidence given in the cause.

248 The COURT: This motion for a *nunc pro tunc* entry is sustained and the Clerk is ordered to include in the Transcript on the appeal to the Appellate Court, Exhibit "A," in accordance with the motion.

To which ruling of the Court the Defendant, by counsel, at the time excepted.

249 May Term, 1904.

Monday, May 2d, 1st Day.

Court met pursuant to adjournment.
Present: The Hon. Henry Clay Allen, Judge.

No. 10583.

ROBERT L. PORTER ET AL.
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Comes now the plaintiffs, by Gifford and Gifford, and the defendant by Hon. L. J. Hackney, and the motion for a *nunc pro tunc* entry is submitted to the Court, and the Court having seen and heard the evidence and the argument of counsel finds that the paper purporting to be a copy of the assessment upon which this is predicated, the original paper now being a part of the Bill of Exceptions in this cause and appearing on page 130 of the transcript filed in this case in the Appellate Court of this State, was filed with the amended complaint in the Boone Circuit Court and is and was the "Exhibit A" referred to in the first and second paragraphs of amended complaint in this cause, and is a part of the complaint and record in this cause.

And the Clerk of the Marion Circuit Court is ordered to include said "Exhibit A" in the transcript on appeal of this cause to the Appellate Court of the State of Indiana as a part of the record in this cause and as said Exhibit "A."

All of which is ordered adjudged and decreed by the Court.

To which ruling and order of the Court the defendant by counsel excepts, and thirty days' time is given to file bill of exceptions.

250 And court adjourned.

HENRY CLAY ALLEN, *Judge.*

251 STATE OF INDIANA, *County of Marion, ss:*

I, Walter N. Carpenter, Official Reporter of the Marion Circuit Court, of Marion County, State of Indiana, duly appointed and qualified, hereby certify That upon the trial of this cause, wherein Robert L. Porter, *et al.*, are plaintiffs, and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company is defendant, I took down in shorthand, all of the oral evidence given, including both questions and answers, and the documentary evidence, and noted all of the objections made to the admission of evidence, the rulings of the court as to the admission and rejection of evidence, and the exceptions taken thereto; that having been requested by the Defendant to furnish it with a Typewritten Transcript of all of said proceedings so taken and noted by me upon the trial of said cause, including

all documentary evidence, I prepared the foregoing Transcript, and hereby certify that said Transcript contains all the evidence given in said cause, so taken by me upon said trial, at the time and place aforesaid.

WALTER N. CARPENTER,
Official Reporter Marion Circuit Court.

May 17, 1904.

Stenographer's fees $24.00.
Paid by Def't.

WALTER N. CARPENTER, *Stenographer.*

252 STATE OF INDIANA, *County of Marion, ss:*

I, William E. Davis, Clerk of the Marion Circuit Court, of Marion County, State of Indiana, do hereby certify That the foregoing Typewritten Transcrpit was filed in my office by Walter N. Carpenter, Official Reporter of said Court, on the 27th day of May, 1904.

Witness my hand and the seal of said court, This 27th day of May, 1904.

[SEAL.] WM. E. DAVIS, *Clerk.*

Filed May 27 1904.

WM. E. DAVIS, *Clerk.*

253 And be it further remembered That the above and foregoing Typewritten Transcript of the evidence, so taken, reported and filed, as aforesaid, contains all the evidence given in said cause upon the plaintiffs' motion to amend the record in said cause, with the objections thereto, the rulings of the court on such objections, and the exceptions taken thereto, and to the order of the Court amending said record, and the said — is ordered to be certified to, without copying, as a part of the Record of this cause.

And on the 27th day of May, 1904, and within the time allowed by the Court so to do, the Defendant tendered this, its bill of exceptions, and prayed that the same might be signed, sealed and made a part of the Record in this cause; which is accordingly done this 27th day of May, 1904.

HENRY CLAY ALLEN,
Judge Marion Circuit Court of Marion County, Indiana.

Filed May 27 1900.

WM. E. DAVIS, *Clerk.*

254 STATE OF INDIANA, *ss:*

In the Appellate Court.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY
vs.
ROBERT L. PORTER ET AL.

The appellant is hereby notified that on the 2d day of June, 1904 the appellee will file a petition in the Clerk's office of the Supreme Court of the State of Indiana for a writ of certiorari requiring the Clerk of the Marion Circuit Court to correct the transcript on appeal of this cause by certifying up the *nunc pro tunc* entry and order of the said lower court made with reference to Exhibit A of the first and second paragraphs of amended complaint in said cause, which order was made on the 2nd day of May, 1904, and which is not now a part of the transcript in this cause.

GIFFORD & GIFFORD,
Attorneys for Appellees.

Dated this May 11, 1904.

I hereby acknowledge service of the above notice this 11th day of May, 1904.

L. J. HACKNEY,
Attorney for Appellant.

255 STATE OF INDIANA, *ss:*

In the Appellate Court.

No. 5069.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY
vs.
ROBERT L. PORTER ET AL.

The appellees respectfully show to the Court that the record in the Marion Circuit Court has been corrected by order of said court in this, to-wit: By showing an order that the paper on file marked Exhibit A to the first and second paragraphs of Complaint be made to show that it is Exhibit A to the first and second paragraphs of Amended Complaint in said cause and is ordered made a part of the files of said cause, as appears of record in Order Book 161, page 288, of the records of said Marion Circuit Court, which order was made on the 2nd day of May, 1904.

Wherefore the appellee prays the Clerk of said Court be ordered to certify to this court a transcript of the order aforesaid and all proceedings relating thereto, and a copy of the said Exhibit A.

GEORGE H. GIFFORD.

Subscribed and sworn to before me this 11th day of May, 1904.

GLEN J. GIFFORD,
Notary Public.

My Comm. expires Sept. 25, 1907.

256 (Endorsement:) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company *vs.* Robert L. Porter, *et al.* Appellate Court State of Indiana. Motion for certiorari and notice. Gifford & Gifford, Tipton, Indiana, Attorneys for Appellees. (Notice for June 2-04). Filed May 23 1904 R. A. Brown, Clerk. Granted.

257 STATE OF INDIANA, *ss:*

In the Appellate Court, May Term, 1904.

No. 5069.

C. C. C. & ST. L. RY. CO.
vs.
ROBERT L. PORTER ET AL.

Appeal from the Marion Circuit Court. (10583.)

In the above entitled cause, it was alleged, on behalf of the appellees, that the transcript of the record and proceedings of the Court below on file and before the Court, is diminished and defectively certified in the following material particulars, to-wit: as set forth in the verified application for a writ of certiorari attached hereto and made a part hereof.

Whereupon the Court ordered that a Certiorari be awarded, directed to the Clerk of said Marion Circuit Court, commanding him forthwith to make out and certify to the Appellate Court aforesaid, a full and complete transcript of the records and proceedings in said cause in the Marion Circuit Court, and more particularly of the matters and things so alleged as defective, and have the same with this writ before the Judges of said Appellate Court without delay, at the Appellate Court Rooms, in Indianapolis.

Taken from the Records of said Court.

Witness, the Clerk of the Appellate Court, and the seal thereof, the 2nd day of June, 1904.

[SEAL.] ROBERT A. BROWN,
Clerk Appellate Court.

258 (Endorsement:) 5069. Certiorari Appellate Court of Indiana. C. C. C. & St. L. Ry. Co. *vs.* Robert L. Porter, *et al.* To the Clerk of the Marion Circuit Court. Returnable forthwith. Respectfully returned. The *nunc pro tunc* entry herein and directions of the Marion Circuit Court thereon, were filed in the Appellate Court on June 2nd, 1904, at 4 o'clock P. M. June 3rd, 1904. Wm. E. Davis, Clerk Marion Circuit Court. (Filed June 3, 1904, R. A. Brown, Clerk.)

259 And afterwards, to-wit: On June 27, 1904, come the appellees, by counsel, and file eight copies of their Additional Authorities herein.

And afterwards, to-wit: On May 9, 1905, the same being the 140 Judicial Day of the November Term 1905 of said Appellate Court, the following further proceedings were had herein, to-wit:

Come the parties by counsel, and the Court being fully advised in the premises, affirms the judgment of the Marion Circuit Court, with the following opinion pronounced herein by Roby, J.:

260 In the Appellate Court of Indiana, Second Division.

No. 5069.

THE C. C. C. & ST. L. RY. CO.
v.
ROBERT L. PORTER ET AL.

From the Marion Circuit Court.

ROBY, *J.*:

It appears from the complaint that the appellant is the owner of the back-lying real estate within 150 feet of a street, in the City of Lebanon, improved in 1896 under the Barrett Law, the purpose of the action being to foreclose the lien of the assessment upon said back-lying real estate, the front portion thereof owner by other parties having sold for an amount less than such assessment.

A demurrer for want of facts to each of the two paragraphs of complaint was overruled. An answer of several paragraphs was filed, including a general denial; special findings of fact and conclusions of law were made and stated by the court, and a judgment of foreclosure rendered in accordance therewith, from which this appeal is taken.

Since the cause was tried and since the appeal was perfected, the case of Vorhis *v.* Pittsburg, etc. Co. (70 N. E. 249), the facts of which are very similar, has been decided, the conclusions announced therein rendering it unnecessary to do more at this time with regard to many of appellant's contentions than to cite the foregoing case.

It was asserted in appellant's original brief that the complaint was bad in failing to exhibit a copy of the assessment roll. Return to a writ of certiorari shows the exhibit to have been filed with
261 the amended complaint, a *nunc pro tunc* entry having been made to that effect by the trial court.

Appellant contends that in so much as the evidence upon which such entry was made shows that the exhibit was not attached to the pleading and that no separate entry of the filing of said exhibit with the pleading was made, that there was no basis upon which the *nunc pro tunc* entry could be made.

The exhibit is identified by the file mark of the Clerk of the Boone

Circuit Court and by parol evidence, and there is no evidence to the contrary. Security etc. *v.* Arbuckle, 123 Ind. 518.

While the exhibit was not bodily attached to the pleading, it was referred to therein as follows: "A copy of which corrected and amended estimate report is filed herewith, made a part hereof and marked Exhibit A."

The exhibit thus marked and filed with the complaint became a part thereof without a separate order book entry.

It is also asserted that an election to foreclose the assessment lien upon the property fronting upon the improved street estopped the appellee from a subsequent foreclosure upon backlying property. The proposition seems to be otherwise held. Vorhis *v.* Pittsburg, *supra.*

Judgment affirmed.

262 And afterwards, to-wit: On July 6, 1905, the same being the 40th Judicial Day of the May Term 1905 of said Court, comes the appellant, by counsel, and files its petition and brief (8) for a rehearing herein.

And afterwards, to-wit: On November 15, 1905, the same being the 153rd Judicial Day of the May Term 1905 of said Court, come the parties by counsel, and the Court being fully advised in the premises, overrules appellant's petition for a rehearing, with the following opinion pronounced by Wiley, C. J., and with concurring opinions by Comstock and Roby, J. J.: (here insert).

263 On Petition for Rehearing.

WILEY, *C. J.:*

In appellant's brief in support of its petition for a rehearing four propositions are presented and discussed:

(1) That appellees' having foreclosed the lien upon the abutting property can not now maintain another suit to foreclose the same lien upon the back-lying property.

(2) If there was no assessment against the back-lying property there can be no foreclosure, and if there was an assessment it was indivisible and appellees can not make it divisible and split their demands.

(3) That it was error to allow attorney's fees as they were not claimed in the complaint, nor could more than one attorney's fee be recovered.

(4) That there was not due process of law and appellant was denied an equal protection of the law.

It would seem that the first, second and fourth propositions just stated have been adjudicated adversely to appellant's contention by the decision in the case of Voris *vs.* Pittsburgh Plate Glass Company, 163 Ind. 599, upon which the original opinion of affirmance was based.

The Appellate Court is bound by the law as declared by the Su-

preme Court, and hence that case rules the one here as to all similar questions involved and decided. Speaking for myself, I am not in full accord with the rule there declared that when an assessment is made against abutting property for a street improvement where such property does not extend back from the street line 150 feet, that the lien of the assessment attaches to the back-lying property within the taxing district, even where no assessment has
264 been made against such back-lying property and the name of its owner has not been placed upon the assessment roll. Neither am I in accord with the doctrine that the holder of the lien can first proceed against the abutting property and upon failure to realize upon sale a sufficient sum to discharge the lien, costs, etc., he may subsequently proceed against the next adjacent back-lying property, and so on till all the property within the taxing district is exhausted. This would permit the lien holder to split up his demand and bring as many suits as there are property owners within the taxing district. There might be one, two, three or more of such property owners, and this would be manifestly unjust and inequitable, and necessarily lead to a multiplicity of suits. This is against the policy of the law. The statute (§ 4290 Burns 1901) declares that such a lien shall be foreclosed "as a mortgage is foreclosed," and that the lien holder shall recover the amount of the bond or certificate, interest and cost, and "a reasonable attorney's fee." By § 4297, Burns 1901, it is provided that in such foreclosure any number of "owners of property on which the same" (certificates or bonds) "are a lien, may be joined as defendants in such suits." Being true, as held in the Voris case, that while the abutting property is primarily liable, the lien of the assessment attaches to all the back-lying property within the taxing district, whether the assessment or the name or names of the back-lying owner or owners appear upon the assessment roll, it necessarily follows that in a suit to foreclose the lien, all the back-lying owners, under the statute, are proper defendants and should be made such, to the end that litigation might be reduced to a minimum; and property owners might not be unnecessarily embarrassed by a multiplicity of suits and burdened by an accumulation of unnecessary costs and at-
265 torneys' fees. While it is not probable, it is highly possible, in such case that a half dozen property owners might own lands adjacent and within the taxing district, and, if so, there may be six separate foreclosure suits. If six such suits, then six separate and distinct attorney's fees may be included and collected, and costs, taxed and collected six times. To illustrate the point I have in mind:

Suppose an assessment is made against abutting land for a street improvement in the sum of $500; suppose there are six separate tracts of land adjacent thereto and to each other within the taxing district owned by different persons. The lien holder first brings his suit to foreclose his lien on the abutting property. He is entitled to judgment for the amount of the assessment, the interest thereon, attorney's fees and costs. The property is sold under the decree and

purchased for $12, as one tract of land was in this case. His judgment remains unsatisfied. He then brings a second suit to foreclose the lien against the second tract and he would be entitled to recover the amount of his former judgment, which included principal, interest, costs and attorney's fees, with interest thereon from the time of the rendition of the first judgment, and an additional sum for his attorney's fees and costs. The second tract of land would be advertised and sold, and bid in for any amount,—say $50. Still his lien is unsatisfied. Up to this time he has not realized enough from the sale of property to pay the costs and attorney's fees. He would then foreclose as against the third tract, and so on and in like manner until he should foreclose against all six tracts, including in each successive judgment the amount of the previous judgment
or judgments and attorney's fees and costs. At the end he
266 would have received and collected attorney's fees six times for the foreclosure of one assessment lien and would have taxed to his credit the costs of each proceeding. This would invite and encourage litigation. The statute does not contemplate that this should be done, but, on the contrary provides that any number of property owners shall be made parties. A reasonable construction of the expression "any number of property owners" would be that it includes all such owners against whose property the lien attaches. It would seem that the legislature had in mind the possible condition referred to in making such provision. Courts should not stand for nor countenance such an unfair and inequitable proceeding, and I feel justified in registering my disapproval of it. This is emphasized by the fact that the respective rights of the lien holder and the abutting and back-lying property owners may all be adjudicated in one foreclosure. When this is done all the lands within the taxing district could be foreclosed against, advertised together for sale, and the abutting tract first sold, and if it did not sell for enough to discharge the lien, the next tract could be offered, and so on until all sold, if necessary.

When equity affords relief against a multiplicity of actions, it would be a violent presumption to say that the legislature, by statute intended to provide a remedy that would encourage litigation and multiplicity of suits; that would enable a litigious party to recover costs and attorney's fees over and over again, at his own election, in any number of actions, when the whole matter and every right he had could be determined in one suit. This would abrogate a rule, both of law and of equity, as old as civil jurisprudence. The record
here shows that in the foreclosure proceedings against the
267 abutting property, there was included as a part of the judgment an attorney's fee equal to about ten per cent. of the amount of principal and interest then due. Also in this proceeding a like amount for attorney's fees was included in the judgment. It thus affirmatively appears that for the enforcement of a single assessment two attorney's fees, aggregating ten per cent. of the amount of each judgment, have been included in the judgments, and which the property owners are required to pay.

Appellant in this action sought relief from this additional and

unwarranted burden by moving to modify the judgment by deducting therefrom attorneys' fees. This motion was overruled. It is insisted that the judgment should not include attorneys' fees for two reasons:

(1) That they are not asked or demanded in the complaint, and

(2) Because to do so would be to require appellant to pay two attorneys' fees in one suit.

There is merit in this contention, for the record shows that the basis of this judgment is the amount of the judgment of the first foreclosure, including interest and cost, and which judgment included, also, a specific amount for appellees' attorneys' fees. I can not, in good conscience, assent to what seems to me to be so unjust and inequitable a rule. If such a rule can obtain, then a lien holder in a street assessment case, who is possessed of a sinister motive and a speculative desire, could split up his demand to correspond to the number of property owners within the taxing district, bring his several suits accordingly, and in each succeeding case increase his demand by an additional attorney's fee and costs, and thus speculate at the expense of the defenseless property owner.

268 I have taken occasion to examine the record in the case of Voris *vs.* Pittsburgh Plate Glass Co., *supra*, and I find that the appellant there had first foreclosed his lien against two abutting lots, had them sold under the decree, and bought them in himself for just enough to pay and satisfy the costs. In his subsequent proceeding against the Plate Glass Company he made no demand for attorneys' fees and hence the question of his right to recover a second attorney's fee was neither involved nor decided in that case. It is therefore not authority upon the question I have had under consideration. It may be the law that such lien holder can maintain successive actions to foreclose the same lien and in each successive action claim and recover successive attorney's fees, but if it is the law it is an unjust and inequitable one, and I feel that I am justified in expressing my disapproval of it. As the Voris case, however, rules this case as to all questions there involved and decided, and I am bound by that decision, I reluctantly concur in overruling the petition for a rehearing. But if I had the power to declare the law, I would unhesitatingly hold that under the facts disclosed by this record the appellees are not entitled to recover, in the second foreclosure proceeding, additional attorney's fees.

ROBY, *J.*:

It is held in the Voris case that successive actions may be brought. This being so, the right to recover costs and attorney fees, incident thereto, is not open to denial.

COMSTOCK, *J.*:

269 The original opinion being based upon the Voris *vs.* The Pittsburgh Plate Glass Co. case, I concur in the conclusion that the petition for a rehearing should be overruled.

270 And afterwards, to-wit: On December 13, 1905, comes the appellant, by counsel, and files its petition to remove the above entitled cause to the Supreme Court for decision, under the provisions of the Subdivision 2, Section 10, of the Act approved March 12, 1901, Acts of 1901, page 565.

And afterwards, to-wit: On June 7, 1906, the same being the 10th Judicial Day of the May Term 1906 of the Supreme Court, the following further proceedings were had herein, to-wit:

Come the parties by counsel, and the Supreme Court being advised in the premises, denies appellant's petition, heretofore filed herein, to remove the above entitled cause from the Appellate Court to this Court for decision.

271 It is therefore considered by the Court that the judgment of the Marion Circuit Court in the above entitled cause be in all things affirmed at the cost of the appellant, all of which is ordered to be certified to said Court.

And it is further considered and adjudged by the Court that the appellees recover of the appellant the sum of $—— for their costs and charges in this behalf expended.

272 And afterward, to-wit, on the 31st day of December, 1906, the same being the —— judicial day of the November term, 1906, of said Appellate Court of Indiana, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files in the office of the clerk of the Appellate Court of Indiana her petition for an allowance of a Writ of Error, said petition being next below attached.

273 In the Appellate Court of Indiana, Division Number Two.

No. 5069.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY

vs.

ROBERT L. PORTER, MELVIN L. BOWLIN, and CHESTER G. HADLEY, Partners, Doing Business under the Firm Name and Style of "Porter, Bowlin & Hadley."

Petition for Writ of Error.

The petition of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company respectfully shows that on the 9th day of May, A. D. 1905, Division Number Two of the Appellate Court of Indiana rendered a judgment against your petitioner in a certain cause, wherein your petitioner was appellant and Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, partners, doing business under the firm name and style of "Porter, Bowlin and Hadley" were appellees; and that on the 15th day of November, 1905, the said Division Number Two of the Appellate Court of Indiana overruled

your petitioner's petition for a rehearing in said cause; that on the 7th day of June, 1906, the Supreme Court of Indiana overruled your petitioner's petition to remove said cause from said Division Number Two of said Appellate Court of Indiana to said Supreme Court; that said judgment affirmed a judgment and a decree rendered against your petitioner by the Circuit Court of Marion county, Indiana, in a cause wherein said Robert L. Porter, Melvin S. Bowlin and Chester G. Hadley, partners doing business under the
274 firm name and style of "Porter, Bowlin & Hadley" were plaintiffs, and your petitioner The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Thomas A. Kersey, Robert H. Kersey and Lilian Kersey were defendants, and that said decree directed that a lien be declared upon certain real estate of your petitioner and your petitioner directed to pay a balance of a certain street improvement lien, amounting with principal, interest and attorney's fees to an aggregate of one thousand, two hundred, forty-two and 79/100 dollars ($1242.79), with interest at six per cent. thereon from the 3rd day of June, 1903, and that said decree declared said lien and directed the petitioner to pay a balance of said sum, as will appear by reference to the record and proceedings in said cause, and that said Division Number Two of said Appellate Court of Indiana is the highest court of said State in which a decision in said suit could be had, where there was a denial by the Supreme Court of said State to remove said cause to said Supreme Court.

And your petitioner claims the right to remove said judgment and decree to the Supreme Court of the United States, by writ of error, under the statute of the United States authorizing writs of error to State courts, being section 709 of the Revised Statutes of the United States, because on the hearing and trial before said Circuit Court of Marion county and also on said hearing before said Division Number Two of the Appellate Court of Indiana, your petitioner contended and claimed that the statutes of the State of Indiana, the ordinances, acts and proceedings of the common council of
275 the city of Lebanon, Indiana, which authorized and directed the making of the street improvement for which such assessment liens were levied, and also the said assessment liens, were each and all, null, void, invalid and of no force and effect for the reason that they and each of them failed to afford your petitioner due process of law and denied it the equal protection of the laws, and that each and all were contrary to and in violation of the Constitution of the United States and particularly of section one of the Fourteenth Amendment to the Constitution of the United States; that said Circuit Court of Marion county and said Division Number Two of the Appellate Court of Indiana decided that the said statutes of the State of Indiana and the said ordinances, acts and proceedings of the said common council of the said city of Lebanon and the said assessments and the liens thereof and each and all of them were valid and did afford your petitioner due process of law and did not deny it the equal protection of the laws and were not contrary to or in violation of the said Constitution of the United States or the Fourteenth Amendment of the Constitution of the United States.

Your petitioner further alleges that the said statutes of the State of Indiana approved March 8, 1889, being sections 4288 to 4299 both inclusive of Burn's Revised Statutes of 1894, and all the acts, ordinances and proceedings of the common council of the city of Lebanon, Indiana in reference to the making of the assessment upon which said judgment and decree was rendered, and the said assess-
276 ments and the liens thereof are null, void, invalid and of no effect for the reason that all and each of them fail to afford your petitioner due process of law and deny it the equal protection of the laws, and all and each are opposed to and contrary to the Constitution of the United States and particularly to section one of the Fourteenth Amendment to the Constitution of the United States, all of which appears by the record of the proceedings in said cause, and in the Assignment of Errors which is herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray for the correction of errors so complained of and for a reversal of said judgment and decree.

Dated at Indianapolis, Indiana, December 31, 1906.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Petitioner,

By FRANK L. LITTLETON,
Attorney for Petitioner.

STATE OF INDIANA, *Appellate Court, ss:*

Let the writ of error issue upon the execution of a bond by The Cleveland, Cincinnati, Chicago & St. Louis Railway Company in the sum of three thousand dollars, such bond when approved to act as a supersedeas.

Dated December 31, 1906.

ULRIC Z. WILEY,
Presiding Judge, Division Number Two, Appellate Court of Indiana.

[Endorsed:] No. 5069. Appellate Court of Indiana. Division No. 2. The C. C. C. & St. L. Ry. Co. *vs.* Robert L. Porter, *et al.* Petition for Allowance of Writ of Error and allowance of same. Filed Dec. 31 1906. R. A. Brown Clerk. Frank L. Littleton, Attorney for Petitioner.

277 And on the same day came again the said appellant, by counsel, and filed in the office of the clerk of said Appellate Court of Indiana a Writ of Error from the Supreme Court of the United States to the said Appellate Court of Indiana in this cause, said Writ of Error being hereto next below attached and being as follows:

278 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of Division Number Two of the Appellate Court of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment of a plea which is in said court before you, between The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, partners, doing business under the firm name and style of "Porter, Bowlin & Hadley," wherein was drawn in question the validity of a statute of the State of Indiana and an authority exercised thereunder on the ground of their being repugnant to the Constitution of the United States and the Fourteenth Amendment thereto, and the decision was in favor of their validity, a manifest error hath happened to the great damage of the said The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may
279 cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 31st day of December, 1906.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk Circuit Court of the United States, District of Indiana.

Allowed.

ULRIC Z. WILEY,
Presiding Judge, Division Number Two, Appellate Court of Indiana.

December 31, 1906.

[Endorsed:] Filed Dec. 31 1906 R. A. Brown, Clerk.

280 And on the same day again came the appellant, by counsel, and filed in the office of the clerk of said Appellate Court of Indiana its bond on Writ of Error in the penal sum of three thousand dollars, which said bond is now taken and approved and is hereto next below attached.

281 In the Supreme Court of the United States.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

ROBERT L. PORTER, MELVIN L. BOWLIN and CHESTER G. HADLEY, Partners, Doing Business Under the Firm Name and Style of "Porter, Bowlin and Hadley," Defendants in Error.

Bond.

Know all men by these presents:—That The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a corporation, as principal, and The American Surety Company of New York, a corporation, as surety, are held and firmly bound unto Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, partners, doing business under the firm name and style of "Porter, Bowlin and Hadley," in the sum of three thousand dollars, to be paid to said obligees, to which payment well and truly to be made, the said obligors bind themselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 21 day of August, 1906.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by Division Number Two of The Appellate Court of Indiana.

Now, Therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said
282 writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By C. E. SCHAFF, *General Manager.*

Attest:
E. T. OSBORN,
[SEAL.] *Ass't Sec'y.*

AMERICAN SURETY COMPANY OF NEW YORK,
By E. V. CLARK, *Resident Vice-President.*

Attest:
JOHN S. HUNT,
Resident Assistant Secretary.

Bond approved, and to operate as a supersedeas.

ULRIC Z. WILEY,
Presiding Judge, Division Number Two, Appellate Court of Indiana.

December 31, 1906.

[Endorsed:] No. 5069. Appellate Court of Indiana. Division No. 2. The C. C. C. & St. L. R'y Co. *vs.* Robert L. Porter *et al.* Copy. Bond on Writ of Error. Filed Dec. 31 1906 R. A. Brown Clerk.

283 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said Appellate Court of Indiana the citation on said Writ of Error duly signed by the Honorable Ulric Z. Wiley, presiding Judge of Division Number two of the Appellate Court of Indiana, and proof of service of the citation on the defendants in error, said citation and proof of service thereof, being hereto next below attached and being as follows:

284 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, partners, doing business under the firm name and style of "Porter, Bowlin & Hadley," Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Appellate Court of Indiana, wherein The Cleveland, Cincinnati, Chicago & St. Louis Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in cause No. 5069 in Division Number Two of said Appellate Court, as in said writ mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Presiding Judge Division Number Two, Appellate Court of Indiana, this 31st day of December, 1906.

ULRIC Z. WILEY,
Presiding Judge, Division Number Two,
Appellate Court of Indiana.

[Seal Appellate Court, State of Indiana. Speedily and without delay.]

Attest:
ROBT A. BROWN,
Clerk Appellate Court of Indiana.

TIPTON, INDIANA, *December* 31, 1906.

We, attorneys of record for the defendants in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

GIFFORD & GIFFORD,
Attorneys for Defendants in Error, Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley.

WILLIAM H. HUSTON.

I authorize and deputize William H. Huston to serve this citation.

ULRIC Z. WILEY,
Presiding Judge Division No. Two,
Appellate Court of Indiana.

Dec. 31, 1906.

[Endorsed:] Filed Dec. 31 1906 R. A. Brown, Clerk.

285 STATE OF INDIANA, *Marion County, ss:*

William H. Huston, of lawful age, being first duly sworn, on oath deposes and says:

I was duly authorized and deputized by Hon. Ulric Z. Wiley, Presiding Judge of Division number Two of the Appellate Court of Indiana, to serve upon the defendants in error the citation hereto attached and identified by my signature. I served the same by delivering personally to George H. Gifford, of the law firm of Gifford and Gifford, attorneys for Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, defendants in error, a true and certified copy of said citation with all endorsements thereon, at Tipton, Indiana, December 31st, 1906.

WILLIAM H. HUSTON.

Subscribed and sworn to before me this 31st day of December, 1906.

[NOTARIAL SEAL.] FRANK L. LITTLETON,
Notary Public in and for Marion County, Indiana.

My commission expires Jan. 12, 1909.

Mileage, 80 miles at 10c..... $8.00
Service 2.00

$10.00 paid by plaintiff in error.

WILLIAM H. HUSTON.

[Endorsed:] Filed Dec. 31 1906 R. A. Brown, Clerk.

286 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said Appellate Court of Indiana, an Assignment of Errors in the Supreme Court of the United States on the Writ of Error herein, said assignment of Errors being hereto next below attached and being as follows:

287 Appellate Court of Indiana, Division Number Two.

No. 5069.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant,

vs.

ROBERT L. PORTER, MELVIN L. BOWLIN, and CHESTER G. HADLEY, Partners, Doing Business under the Firm Name and Style of "Porter, Bowlin & Hadley," Appellees.

In the Supreme Court of the United States.

On Writ of Error to Division Number Two of the Appellate Court of Indiana.

Assignment of Errors.

Now comes the above named appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors, to-wit:

First. Division Number Two of the Appellate Court of Indiana erred in affirming the judgment and decree of the Circuit Court of Marion county, Indiana.

Second. Division Number Two of the Appellate Court of Indiana erred in overruling appellant's petition for a rehearing.

Third. Division Number Two of the Appellate Court of Indiana erred in holding that the act of the General Assembly of the
288 State of Indiana, approved March 8, 1889, being Chapter CXVIII of the laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, published in the Acts of 1889, at page 237, and all acts amendatory thereof, being sections 4288 to 4299, both inclusive, of Burns' Revision of the statutes of Indiana of 1894, afforded to appellant due process of law and did not deny it the equal protection of the laws, and that they were not opposed to and in contravention of the Constitution of the United States and the Fourteenth Amendment thereto.

Fourth. Division Number Two of the Appellate Court of Indiana erred in holding that the ordinances, acts and proceedings of the common council of the city of Lebanon, State of Indiana, afforded to the appellant due process of law and did not deny it the equal protection of the laws, and that they were not opposed to and in contravention of the Constitution of the United States.

Fifth. Division Number Two of the Appellate Court of Indiana erred in holding that the assessments upon appellant's real estate were levied by due process of law as guaranteed by the Constitution of the United States.

Sixth. Division Number Two of the Appellate Court of Indiana erred in holding that appellant was not denied the equal pro-
289 tection of the laws guaranteed by the Constitution of the United States when the improvement assessments were levied against its property.

Seventh. The act of the General Assembly of the State of Indiana, approved March 8, 1889, being chapter CXVIII of the laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, published in the Acts of 1889, at page 237, and all acts amendatory thereof, being sections 4288 to 4299, both inclusive, of Burns' Revision of the statutes of Indiana of 1894, contravenes the Constitution of the United States and the Fourteenth Amendment thereof, for the reason that said act denied to the appellant due process of law in the matter of making an assessment and declaring a lien against its property for a local improvement.

Eighth. The act of the General Assembly of the State of Indiana, approved March 8, 1889, being chapter CXVIII of the laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, published in the Acts of 1889, at page 237, and all acts amendatory thereof, being sections 4288 to 4299, both inclusive, of Burns' Revision of the statutes of Indiana of 1894, contravenes the Constitution of the United States and the Fourteenth Amendment thereof for the reason that said act denied to the appellant the equal protection of the laws in the matter of mak-
290 ing an assessment and declaring a lien against its property for a local improvement.

For which errors the appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, prays that the said judgment of Division Number Two of the Appellate Court of Indiana, dated May 9, 1905, be reversed and a judgment rendered in favor of said Railway Company and for costs.

FRANK L. LITTLETON,
Attorney for The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

291 [Endorsed:] In the Supreme Court of the United States. On Writ of Error to Division No. 2 Appellate Court of Indiana. The C. C. C. & St. L. Ry. Co. *vs.* Robert L. Porter, *et al.* Assignment of Errors. Frank L. Littleton, Atty. for Plaintiff in Error.

292 STATE OF INDIANA:

Appellate Court of Indiana, Division Number Two.

I, Robert A. Brown, clerk of said court, do hereby certify that there were lodged with me as such clerk on December 31, 1906, in the matter of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, appellant vs. Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, partners, doing business under the firm name and style of "Porter, Bowlin & Hadley," appellees, No. 5069.

1. The original bond of which a copy is herein set forth.
2. Four copies of the writ of error, as herein set forth, one for each appellee above named, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Indianapolis, Indiana, this 31st day of December, A. D. 1906.

[Seal Appellate Court, State of Indiana. Speedily and without delay.]

ROB'T A. BROWN,
Clerk Appellate Court of Indiana.

293 STATE OF INDIANA:

Appellate Court of Indiana, Division Number Two.

I, Robert A. Brown, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the above entitled cause in Division Number Two of the Appellate Court of Indiana, and on petition to remove said cause to the Supreme Court of Indiana; also the original writ of error from the Supreme Court of the United States in this cause, and the original citation to the defendants in error and proof of service thereof, and the original Assignment of Errors in the Supreme Court of the United States on said writ of error, and a copy of the original bond given on said petition for writ of error.

Which said transcript, annexed hereto, together with said original writ of error, original citation, original assignment of error and copy of bond, I hereby certify as and for my full return to said writ of error.

In witness whereof, I hereto set my hand and affix the seal of said Appellate Court of Indiana, at the city of Indianapolis, Indiana, this 31st day of December, 1906.

[Seal Appellate Court, State of Indiana. Speedily and without delay.]

ROB'T A. BROWN,
Clerk Appellate Court of Indiana.

Endorsed on cover: File No. 20,549. Indiana appellate court, division No. 2. Term No. 213. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in error, *vs.* Robert L. Porter, Melvin L. Bowlin, and Chester G. Hadley, partners, doing business under the firm name and style of Porter, Bowlin & Hadley. Filed January 26th, 1907. File No. 20,549.

FILED
MAR 27 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 213.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, *Plaintiff in Error*,

v.

ROBERT L. PORTER, MELVIN L. BOWLIN AND CHESTER G. HADLEY, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF "PORTER, BOWLIN AND HADLEY," *Defendants in Error*.

IN ERROR TO DIVISION NUMBER TWO OF THE APPELLATE COURT OF THE STATE OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

LEONARD J. HACKNEY,
FRANK L. LITTLETON,
For Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 213.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, *Plaintiff in Error,*

v.

ROBERT L. PORTER, MELVIN L. BOWLIN AND CHESTER G. HADLEY, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF "PORTER, BOWLIN AND HADLEY," *Defendants in Error.*

IN ERROR TO DIVISION NUMBER TWO OF THE APPELLATE COURT OF THE STATE OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to Division Number Two of the appellate court of Indiana, prosecuted by the plaintiff in error to review a judgment of that court in favor of the

defendants in error foreclosing an alleged street improvement lien against the property of the plaintiff in error.

This action was originally begun by the defendants in error against the plaintiff in error in the circuit court of Boone county, Indiana, to foreclose an alleged street assessment lien against property owned by the plaintiff in error. An amended complaint was filed in two paragraphs, each based on a separate assessment. The first paragraph of amended complaint alleged the construction of a street improvement and that an assessment of $588.56 was made against the lands of one Mary Kelley, which lands abutted on the street improved. That subsequently the said assessment was foreclosed and her lands sold for $75, leaving a balance of said assessment amounting to $581.32 unpaid. It was then alleged that the plaintiff in error owned lands lying immediately back of the lands of said Kelley and within 150 feet of the improved street, and that the plaintiff in error was liable for the unpaid balance of said assessment. (Printed Record, pp. 4-8.)

The second paragraph of amended complaint alleged that an assessment of $273.73 was made against the lands of one John T. Walton, which lands abutted on the street improved. That subsequently the said assessment was foreclosed and his lands sold for $12, leaving a balance of said assessment amounting to $302.80 unpaid. It was then alleged that the plaintiff in error owned lands lying immediately back of the lands of said Walton and within 150 feet of the improved street, and that the plaintiff in error was liable for the unpaid balance of said assessment. (Printed Record, pp. 8-12.)

The venue of said suit was then changed to the circuit court of Marion county, Indiana. (Printed Record, p. 13.)

The plaintiff in error separately demurred to each par-

agraph of amended complaint on the ground that the same did not state facts sufficient to constitute a cause of action. (Printed Record, pp. 14, 15.) The demurrers were overruled and exceptions reserved. (Printed Record, p. 15.)

The plaintiff in error filed an answer to the amended complaint in nine paragraphs. (Printed Record, p. 15, *et seq.*)

The first paragraph was a general denial. (Printed Record, p. 15.)

The second paragraph of answer alleged that the lands of the plaintiff in error, described in the complaint, did not abut upon the street improved, but that they lay back of lands owned by other parties abutting upon said street; "that in the proceedings of the common council of the city of Lebanon, in any action taken by the civil engineers of said city, in any notice to property owners, in any assessment of property had, given or done with reference to said improvement, this defendant's tracts were not named, described nor referred to, nor was either of them; that neither of said tracts was assessed for said improvement, neither of said tracts was considered with reference to any assessment for said improvement, neither of said tracts was benefited by said improvement; that the defendant did not appear before said council or any committee of said council, either actually or constructively, with reference to either of its said tracts, and the records of the proceedings of the city of Lebanon as to said improvements do not disclose any such appearance by or notice to this defendant, or the consideration or assessment of either of said tracts for such improvement." (Printed Record, pp. 15-16.)

The third paragraph of answer was as follows:

"For third and further answer to the amended complaint and each of the paragraphs thereof separately the

defendant says that the acts of the general assembly of the state of Indiana under and by virtue of which it is claimed and assumed that the liens respectively sued upon have accrued and attach to the respective tracts of the defendant is unconstitutional and void, in that it makes no provision for a notice to or a hearing from the property owner whose property does not abut upon the street to be improved; it denies due process of law, denies the equal protection of the laws, and takes private property for public use without compensation." (Printed Record, p. 16.)

The other paragraphs of answer set up defenses which can not be considered on this writ of error.

A demurrer was filed to the third paragraph of answer, which was sustained and exception duly reserved. (Printed Record, p. 21.)

The issues were closed by a reply of general denial. (Printed Record, p. 21.)

The cause was tried by the court, and a special finding of facts was made, and conclusions of law stated thereon. (Printed Record, p. 23, *et seq.*)

The special finding of facts shows the adoption of a declaratory resolution for the improvement of West Main street in the city of Lebanon, Indiana; the giving by publication of a general notice to "all persons interested" that they could appear at a stated time and object to said improvement; that objections were heard to said improvement and said improvement was ordered and plans and specifications for the same adopted; that after advertising for bids the contract was let to defendants in error, who did the work, which was accepted after completion. That thereupon an estimate of the costs and expenses of said improvement was made and an assessment made against the parcels of land abutting upon the improved street. The assessment appears in the printed record at page 66. The name of the plaintiff in error did

not at any time appear in the assessment roll, neither did its property. A general notice was then given by publication to "all persons interested or aggrieved" of a hearing on said estimate, and for them to appear and make objections, if any, to said final estimate report. (Printed Record, p. 25.) That the estimate was amended and corrected after such hearing, and adopted and approved. The court then finds that Mary Kelley owned land abutting on said street, which was assessed $588.56, and that the plaintiff in error owned lands lying back of the lands of said Mary Kelley and within 150 feet of said street; that John T. Walton owned lands abutting on said street, which were assessed $273.73, and that the plaintiff in error owned lands lying back of the lands of said John T. Walton and within 150 feet of said street. The description of all of said lands was set out. The court then finds that there was a foreclosure of said lien against the lands of said Mary Kelley and a sale for $75, leaving a balance of $617.17 due, with interest and attorney's fees amounting to $836.70; and that there was a foreclosure of said lien against the lands of said John T. Walton, and a sale of the same for $12, leaving a balance of $314.80 due, with interest and attorney's fees amounting to $406.09. The fifteenth finding of the court was as follows:

"And the court further finds that there were no further acts, proceedings, or findings of said city or its officers of and concerning said improvement and assessments than as specially found herein, and that the defendant railway company was not otherwise a party to said proceedings and assessment than as herein specially found, nor was its said property otherwise assessed or affected than as herein specially found, and that said railway company was not named as nor did it appear as a party in interest in any notice, contract, report, assessment or record relating to said improvement, nor was its property assessed for or on account of said improvement in man-

ner or form other or different from that herein specially found." (Printed Record, p. 29.)

On the above findings of facts the court stated a conclusion of law in favor of the defendants in error, and against the plaintiff in error, to which conclusion the plaintiff in error excepted. (Printed Record, p. 29.)

A decree was then entered against the plaintiff in error for the balance of said assessments amounting to $836.70 and $406.09 respectively, and its property described in the complaint ordered sold, and that if said real estate should not sell for a sufficient sum to pay said amounts, the remainder should be collected from the plaintiff in error. (Printed Record, p. 31.)

A motion for a new trial was filed and overruled. (Printed Record, pp. 32, 33.)

An appeal was then taken to the appellate court of Indiana (Printed Record, p. 35), assigning as errors, among others, error in overruling the demurrer to the amended complaint (Printed Record, pp. 117, 118), error in sustaining the demurrer to the third paragraph of answer (Printed Record, p. 118), error in overruling the motion for a new trial (Printed Record, p. 118), and error in each conclusion of law (Printed Record, p. 119).

The second division of the appellate court of Indiana affirmed the decree of the lower court. (Printed Record, pp. 143-144.)

A petition for rehearing was overruled. (Printed Record, p. 144.)

The plaintiff filed its petition to remove the case to the supreme court of Indiana (Printed Record, p. 148), which petition was denied. (Printed Record, p. 148.)

Briefly stated, the record discloses the following:

First. The levying of an assessment for a street improvement by the proper officers of the city of Lebanon,

Indiana, under and pursuant to the statutes of the state of Indiana known as the Barrett law. The statute is hereinafter set out in full. (*Post*, pp. 30-40.)

Second. That the assessment was made wholly against the abutting owner, and not against the plaintiff in error.

Third. That back of the property of the abutting owner the plaintiff in error owned all the land within 150 feet of the street.

Fourth. That the plaintiff in error was not a party in any wise to the assessment made against the abutting owner, and did not appear in any of the notices of assessments made.

Fifth. That the assessment against the abutting owner was foreclosed and the property sold, leaving a large balance of the assessment unpaid. The plaintiff in error was not a party to the foreclosure suits.

Sixth. That a suit was brought to foreclose the alleged lien for the unpaid balance of the assessment levied against the abutting owner on the back-lying property of the plaintiff in error.

Seventh. That a decree was entered against plaintiff in error that it should pay said unpaid balance; that in such suit it had no opportunity to be heard as to the amount of the assessment—said unpaid balance—against it.

Specification of Errors Relied Upon.

The assignment of errors of the plaintiff in error is as follows:

First. Division number two of the appellate court of Indiana erred in affirming the judgment and decree of the circuit court of Marion county, Indiana.

Second. Division number two of the appellate court

of Indiana erred in overruling appellant's petition for a rehearing.

Third. Division number two of the appellate court of Indiana erred in holding that the act of the general assembly of the state of Indiana approved March 8, 1889, being chapter CXVIII of the laws of the state of Indiana passed at the fifty-sixth regular session of the general assembly, published in the acts of 1889, at page 237, and all acts amendatory thereof, beings sections 4288 to 4299, both inclusive, of Burns' revision of the statutes of Indiana of 1894, afforded to appellant due process of law and did not deny it the equal protection of the laws, and that they were not opposed to and in contravention of the constitution of the United States and the fourteenth amendment thereof.

Fourth. Division number two of the appellate court of Indiana erred in holding that the ordinances, acts and proceedings of the common council of the city of Lebanon, state of Indiana, afforded to the appellant due process of law and did not deny it the equal protection of the laws, and that they were not opposed to and in contravention of the constitution of the United States.

Fifth. Division number two of the appellate court of Indiana erred in holding that the assessments upon appellant's real estate were levied by due process of law as guaranteed by the constitution of the United States.

Sixth. Division number two of the appellate court of Indiana erred in holding that appellant was not denied the equal protection of the laws guaranteed by the constitution of the United States when the improvement assessments were levied against its property.

Seventh. The act of the general assembly of the state of Indiana approved March 8, 1889, being chapter CXVIII of the laws of the state of Indiana passed at the fifty-sixth regular session of the general assembly, pub-

lished in the acts of 1889, at page 237, and all acts amendatory thereof, being sections 4288 to 4299, both inclusive, of Burns' revision of the statutes of Indiana of 1894, contravenes the constitution of the United States and the fourteenth amendment thereof, for the reason that said act denied to the appellant due process of law in the matter of making an assessment and declaring a lien against its property for a local improvement.

Eighth. The act of the general assembly of the state of Indiana approved March 8, 1889, being chapter CXVIII of the laws of the state of Indiana passed at the fifty-sixth regular session of the general assembly, published in the acts of 1889, at page 237, and all acts amendatory thereof, being sections 4288 to 4299, both inclusive, of Burns' revision of the statutes of Indiana of 1894, contravenes the constitution of the United States and the fourteenth amendment thereof, for the reason that said act denied to the appellant the equal protection of the laws in the matter of making an assessment and declaring a lien against its property for a local improvement.

(Printed Record, pp. 155-156.)

The errors upon which the plaintiff in error relies and which it intends to argue may be more briefly stated as follows:

First. The statutes of Indiana under which the alleged assessment was made denied to plaintiff in error the equal protection of the laws guaranteed to it by section one of the fourteenth amendment of the constitution of the United States.

Second. The statutes of Indiana under which the alleged assessment was made denied to plaintiff in error due process of law guaranteed to it by section one of the fourteenth amendment of the constitution of the United States.

BRIEF OF THE ARGUMENT.

Points and Authorities.

I.

Under section 709, U. S. Compiled Statutes 1901, a federal question is presented, for the reason that the plaintiff in error set up and claimed that the statute of the state of Indiana and the authority exercised under it were repugnant to the constitution of the United States, and the decision was in favor of their validity.

U. S. Compiled Stat., section 709;
Treagea v. *Board,* 164 U. S. 179;
Chicago, etc., R. Co. v. *People,* 200 U. S. 561.

II.

The court to which the writ is directed decided the federal question, for the reason that it based its opinion upon a decision of the supreme court of Indiana, in which it was held that the statute in question is not repugnant to the constitution of the United States.

Opinion, Printed Record, pp. 143-147;
Voris v. *Pittsburg Plate Glass Co.,* 163 Ind. 599;
Bellingham Bay Co. v. *City of New Whatcom,* 172 U. S. 314;
Spencer v. *Merchant,* 125 U. S. 345.

III.

Even if the state court had based its opinion on a non-federal ground, there is a right to removal if the federal

question was set up and the effect of deciding it as contended for would require a different judgment.

Chicago, etc., R. Co. v. *People*, 200 U. S. 561;
Treagea v. *Board*, 164 U. S. 179.

IV.

The writ of error is properly directed to the second division of the appellate court of Indiana, for the reason that the record remained in that court, and the judgment was therein rendered upon the refusal of the supreme court of Indiana to transfer the cause to that court.

Burns' R. S. of Indiana 1901, section 1337j;
National Cotton Oil Co. v. *Texas*, 197 U. S. 115;
Wabash R. Co. v. *Pearce*, 192 U. S. 179;
Wedding v. *Meyler*, 192 U. S. 573;
New York, etc., R. Co. v. *Martin* (Ind. App.), 77 N. E. Rep. 290.

V.

The statute of the state of Indiana (Burns' R. S. 1894, sections 4288-4299, both inclusive, *post*, pp. 30-40), under and pursuant to which the alleged assessment involved in this case was made, is unconstitutional for the reason that said statute does not give, or purport to give, a property owner whose lands are located back of property abutting upon the street improved any hearing or opportunity to be heard upon the amount of the assessment levied against such owner's property. There is no hearing as to the special benefits at any stage of the proceedings, and the amount of the assessment against the back-lying property is arbitrarily determined by subtract-

ing from the original assessment against the abutting owner the amount his property sells for on foreclosure. This is a denial of due process of law.

Central of Georgia Ry. Co. v. *Wright,* 28 Sup. Court Rep. 47;
Security Trust Company v. *Lexington,* 203 U. S. 323, s. c. 27 Sup. Ct. Rep. 87;
Boyd v. *United States,* 116 U. S. 616;
Dartmouth College v. *Woodward,* 4 Wheat. (U. S.) 518, 581;
Village of Norwood v. *Baker,* 172 U. S. 269;
Wright v. *Davidson,* 181 U. S. 371;
Bauman v. *Ross,* 167 U. S. 548;
Spencer v. *Merchant,* 125 U. S. 345;
Walston v. *Nevin,* 128 U. S. 578;
Hibben v. *Smith,* 191 U. S. 310;
Schaefer v. *Werling,* 188 U. S. 516;
Raymond v. *Chicago Union Traction Co.,* 207 U. S. 541;
Beebe v. *Magoun* (Iowa), 97 N. W. Rep. 986;
Lathrop v. *City of Racine* (Wis.), 97 N. W. Rep. 192;
State v. *Pillsbury* (Minn.), 85 N. W. Rep. 175;
McKee v. *Town of Pendleton,* 154 Ind. 652;
Dexter v. *City of Boston,* 176 Mass. 247;
Charles v. *City of Marion,* 100 Fed. Rep. 538;
Kuntz v. *Sumption,* 117 Ind. 1.

VI.

The statute of the state of Indiana (Burns' R. S. 1894, sections 4288-4299, both inclusive, *post,* pp. 30-40), under and pursuant to which the alleged assessment involved in this case was made, is unconstitutional and denies the back-lying property owner the equal protection

of the laws, for the reason that said statute gives the abutting property owner a hearing, or opportunity to be heard, on the question as to whether the proposed assessment exceeds the special benefits to his property, and denies a hearing or opportunity to be heard on such question to the property owner whose property does not abut upon the street improved.

Ex Parte Drayton, 153 Fed. Rep. 986;
Gulf, etc., R. Co. v. *Ellis*, 165 U. S. 150;
Yick Wo v. *Hopkins*, 118 U. S. 356;
Raymond v. *Chicago Union Traction Co.*, 207 U. S. 541;
Beebe v. *Magoun* (Iowa), 97 N. W. Rep. 986;
Chicago, etc., R. Co. v. *Swanger*, 157 Fed. Rep. 783.

ARGUMENT.

PREFATORY.

The questions in this case are simple and clean cut. The plaintiff in error insists that the Indiana statute denied it due process of law and the equal protection of the laws when the alleged assessment was made against its property and judgment of foreclosure rendered. This statute has been before this court, and its constitutionality has been upheld so far as it applied to an abutting property owner. *Hibben* v. *Smith*, 191 U. S. 310; *Schaefer* v. *Werling*, 188 U. S. 516. In the latter case the court followed the decision of the supreme court of Indiana in *Adams* v. *City of Shelbyville*, 154 Ind. 467, and held that as the supreme court of Indiana had held in said case that the statute should be construed so as to give the property owner a hearing, or an opportunity to be heard, on the amount of the assessment to be levied against his property, the statute was not therefore unconstitutional. In all the cases just referred to the person

challenging the constitutionality of the statute was an abutting property owner, while in this case the person challenging the constitutionality of the statute is the back-lying property owner. We concede that the abutting owner has a hearing, or an opportunity to be heard, under the statute as to the assessment against his property, but we contend that at no stage of the proceedings has the back-lying owner a hearing, or an opportunity to be heard, as to the amount to be assessed against his property.

Federal Question Presented.

A federal question is squarely presented by the record. The plaintiff in error in its answer (*ante*, p. 3) set up that it had no notice or opportunity to be heard, and that the statute under which the alleged assessment was made denied the plaintiff in error due process of law and the equal protection of the law. The plaintiff in error claimed that the statute and the authority exercised under it were repugnant to the constitution of the United States, and the decision of the court to which the writ of error was directed, was in favor of their validity. The case is clearly within the provisions of section 709 of the United States statutes.

The appellate court of Indiana, in its opinion, based its decision on the case of *Voris* v. *Pittsburg Plate Glass Co.*, 163 Ind. 599. In that case it was squarely decided that the statute herein challenged and proceedings thereunder were not repugnant to the constitution of the United States. We set out the opinion in the Voris case in full in an appendix to this brief (*post*, pp. 41-50), and refer particularly to that part of the opinion on pages 46, 47.

Even if it should be conceded for the sake of argument (it can not be conceded) that the court did not pass on the federal question in this case, still the federal question

is presented and involved, and it would be the duty of this court to decide it. It is well settled that if a federal question is presented by the record and the state court fails to consider it and decides the case on some non-federal question, and the effect of a decision on the federal question, if decided as contended for, would cause a different decision to be rendered, this court will consider and decide the federal question.

This question was carefully considered in the case of *Chicago, etc., R. Co.* v. *People*, 200 U. S. 561, where it was said:

"But it is equally well settled that the failure of the state court to pass on the federal right or immunity specifically set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by placing the judgment on some principle of common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties."

II.

Writ of Error Directed to Highest Court.

The writ of error in this case was properly directed to division number two of the appellate court of Indiana.

That court is an intermediate appellate court which rendered a definite and final judgment by affirming the decision of the lower court, and the supreme court of Indiana refused to transfer the cause to that court. Section 1337j, Burns' R. S. 1904, Indiana Statutes, provides that decisions of the appellate court of Indiana shall be final, unless among other instances the supreme court of Indiana transfers the case to that court on the ground that "the opinion of the appellate court contravenes a ruling precedent of the supreme court, or that a new question of law is directly involved and was decided erroneously." There was a refusal to transfer in this case, and the decision of the appellate court was therefore final.

Authorities, Prop. IV, *ante*, p. 11.

III.

The Indiana Statute Is Unconstitutional, for the Reason that It Does Not Afford Due Process of Law to the Back-Lying Property Owner.

We think it is elementary that there is due process of law in the making of assessments for local improvements if at some stage of the proceedings the property owner against whose property the assessment is made is given a hearing, or an opportunity to be heard, as to the amount of the assessment to be made against him. That opportunity is not given by the Indiana statute on which the assessment rests.

In this case, after the improvement was completed, a primary assessment roll was made up. Neither the plaintiff in error's name nor its property appeared on that roll. The name and a description of the property of the abutting owner whose property lay between the street and the property of the plaintiff in error were on the roll. The notice was directed to those whose names were on the

roll, and all those had a right to appear and contest the amount of the assessment. The plaintiff in error was not challenged to appear, unless it was challenged to appear because its property lay within 150 feet of the line of the street. The assessment against the abutting owner was made final. There was at no time in the proceedings any notice of any kind to the plaintiff in error, or any attempt to levy any assessment against the plaintiff in error or its property. After the assessment against the abutting owner was made final, the abutting owner failed to pay, and the lien against him was foreclosed. His property sold for a small proportion of the lien, and then this suit was brought to foreclose a lien against the plaintiff in error—a lien not fixed and determined by the assessing authority, but a lien determined by subtracting from the original lien against the abutting owner the amount his property sold for on foreclosure. In the suit to foreclose this lien there was no opportunity to challenge the amount of the lien, and in the proceedings there was at no time any opportunity to challenge the amount of the lien. Indeed, in the proceedings there was at no time any assessment made against the plaintiff in error.

It must be borne in mind that this court adopts the construction placed upon a state statute by the highest court of the state. The supreme court of Indiana, in the case of *Adams* v. *Shelbyville*, 154 Ind. 467, 486, construed the statute here involved as providing that the property owner was entitled to a hearing before the common council on the question of the amount of his assessment, and that it was the duty of the common council to change and correct the assessment to make it conform to the special benefits. In the Adams case the Indiana supreme court said:

"From these considerations we are unable to resist the

conclusion that, upon the hearing provided in section seven, the common council have power to change assessments from the frontage rule in such cases as they may deem just."

This court, in the case of *Schaefer* v. *Werling*, 188 U. S. 516, in considering the same statute, followed the construction given the statute in the Adams case, and in the course of the opinion said:

"Further proceedings were had on appeal, in accordance with the provisions of the statute, which ended in a decision of the supreme court affirming the validity of the assessment, on the authority of *Adams* v. *Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114, and thereupon the case was brought here on writ of error.

"The case involves the validity of a statute of Indiana known as the 'Barrett law,' enacted in 1889, Burns' Rev. Stat. 1894, sections 4288-4298. We deem it sufficient to refer to the opinion in *Adams* v. *Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114, in which the supreme court of Indiana closed an elaborate discussion of the various provisions of the law in these words:

" 'We therefore conclude that section 3, Acts 1889 (Burns' Rev. Stat. 1894, section 4290), must be construed as providing a rule of *prima facie* assessments in street and alley improvements, which allotments by the city or town engineer, under section 6 of said act of 1889 (Burns' Rev. Stat. 1894, section 4293), are subject to review and alteration by the common council and board of trustees, under section 7 of said act of 1889, as amended (Acts 1891, p. 324; Acts 1899, p. 64; Burns' Rev. Stat. 1894, section 4294), upon the basis of actual special benefits received by the improvement; and that under said section seven the common council of a city or board of trustees of an incorporated town have not only the power, but it is their imperative duty to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners.' "

If, as clearly held in the case just referred to, "it is the imperative duty of the common council to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting owners," how can it be said that a property owner against whom no assessment is made, and who has no notice of any kind, has a hearing when the assessment against him is only determined years afterward, when the abutting owner's property fails to sell for enough to cover the assessment against it?

In the case of *McKee* v. *Town of Pendleton*, 154 Ind. 652, the supreme court of Indiana enjoined the enforcement of an assessment made on the front-foot rule on the ground that there was no statute of the state authorizing an assessment on that basis. This decision was at a time when the statute here involved was in full force and effect.

Under this statute the assessment is made on the theory of special benefits to the property, and, as to the abutting owner, the assessment is made and a hearing given. The assessments being made on the theory of special benefits, in order for there to be a valid assessment, the assessment must be specifically made against each property owner, and a hearing or an opportunity to be heard on that specific assessment given. The same theory of special benefits is still the basis in Indiana for making such special assessments. Indiana Acts of 1905, pp. 289, 292.

We think it clear from a mere statement of this case that the plaintiff in error was not afforded due process of law. "Due process of law" has been defined in a great many cases. In the celebrated Dartmouth College case a law which afforded "due process of law" was defined as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." In the case at bar the plaintiff had no hearing, there was no inquiry into the assessment against its property, and there

was no judgment as to the amount of its assessment after trial. The assessment was determined by subtraction years after the improvement had been completed.

In recent cases in this court, state laws have been condemned on the ground that they did not afford due process of law to the property owner against whom an assessment or tax was levied.

In the recent case of *Central of Georgia R. Co.* v. *Wright,* 207 U. S. 161, s. c. 27 Sup. Ct. Rep. 47, it was held that a statute of the state of Georgia which permitted a taxing officer to determine the valuation of omitted taxable property without giving the property owner an opportunity to be heard as to such valuation was unconstitutional on the ground that it denied due process of law. The court in its opinion said:

"In the late case of *Security Trust & S. V. Co.* v. *Lexington,* 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87, decided at the last term of this court, the subject underwent consideration, and it was there held that, before an assessment of taxes could be made upon omitted property, notice to the taxpayer, with an opportunity to be heard, was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace. In that case it was further held that where the procedure in the state court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection, the requirement of due process of law was satisfied.

"Applying the principles thus settled to the statutory law of Georgia, as construed by its highest court, does this system provide due process of law for the taxpayer in contesting the validity of taxes assessed under its requirements?

"Under the scheme provided for, if the property is withheld from return, the comptroller, without notice or

opportunity for hearing, must proceed to value the property, and his valuation is final and conclusive, unless the taxpayer can show—a very unlikely contingency—that the taxing officer has acted in bad faith in making the assessment. Against the assessment thus made there is no relief in the courts of the state upon proceedings brought to collect the taxes or by bill to enjoin their collection. The penalty of failure to return, no matter how honest or well grounded the taxpayer may have been in his belief that the property was not subject to taxation, compels him to submit to the final and conclusive assessment made by the taxing officer.

* * * * * * *

"As we have seen, the system provided in Georgia by the statutes of the state as construed by its highest court requires of the taxpayer that he return all his property, whether its liability is fairly contestable or not, upon pain of *ex parte* valuation, against which there is no relief in the tax proceedings or in the courts, except in those cases where fraud or corruption can be shown in the action of the assessing officer.

"Reluctant as we are to interfere with the enforcement of the tax laws of a state, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the fourteenth amendment to protect against impairment by state action."

In the case of *Hibben* v. *Smith,* 191 U. S. 310, 322, this court upheld the validity of this statute as to an abutting property owner on the ground that he was afforded a hearing as to the amount of the assessment against his property. The court held that due process was afforded because a hearing was provided, and in the course of the opinion quoted with approval the following language from *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 168:

"Due process of law is not violated, and the equal pro-

tection of the laws given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged on his property has had a hearing, or an opportunity for one provided by the statute."

In the case of *Beebe* v. *Magoun,* (Iowa) 97 N. W. Rep. 986, the question of what was "due process of law" in levying ditch assessments was considered, and it was held that there must be a hearing or an opportunity to be heard before the amount of the assessment was determined, or there was not due process of law. The court in the course of its opinion said:

"By 'due process of law,' in a case like this, is meant 'notice and an opportunity of being heard,' and the necessity therefor, as prerequisite to the taking of private property by taxation, is uniformly recognized. The subject received thoughtful consideration in *Gatch* v. *City of Des Moines,* 63 Iowa 718, 18 N. W. 310, and the conclusion was reached that 'the arbitrary appropriation of private property without notice and without an opportunity for hearing can not be defended upon any natural principle of justice, and ought not to be tolerated and upheld by the courts,' and that 'in the ordinary methods of assessment and valuation of property for taxation, whether for general or special purposes, the authorities are very nearly uniform to the effect that it is necessary to the validity of the assessment that the property owner should have notice and an opportunity to be heard.' In that case statutes authorizing the assessment of the cost of street improvements against abutting lots without notice to the owners, and without affording an opportunity of being heard, were declared to be inimical to the provisions of the constitution. The question was again considered at length in *Ferry* v. *Campbell,* 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92, where statutes imposing an inheritance tax were declared subject to the same infirmity. Exceptions there may be, as in the case of a poll tax, a

license tax, and the like, where the amount to be exacted is definitely fixed, and a hearing would be of no avail. The amount of the tax is not open to contest in such cases, though the liability for such amount may be and can be raised subsequently by disputing its collection, or in an action to recover it when obtained by duress. *McMillan* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335, cited by appellee, was such a case. See, also, *Hodge* v. *Muscatine Co.*, (Iowa) 96 N. W. 968. So where the amount is merely the result of a mathematical calculation, the same rule obtains. *Amery* v. *City of Keokuk*, 72 Iowa 701, 30 N. W. 780. But whenever the amount of tax to be exacted depends upon the exercise of the judgment and discretion of those fixing the value of the property or benefits by which such amount is to be measured, an opportunity for correction must be afforded. *Trustees of Griswold College* v. *City of Davenport*, 65 Iowa 633, 22 N. W. 904. 'It is is not enough,' as was said by the court of appeals in *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, 'that the owners chance to have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and the opportunity of being heard.' The presumption ordinarily prevails that a hearing would be advantageous, and whenever there is doubt the burden is upon the party upholding the tax to show the contrary."

In the case of *Murdock* v. *City of Cincinnati*, 39 Fed. Rep. 891, it was held, to quote the reporter's head-note, that—

"A special assessment without notice to the property owner and opportunity to be heard is wanting in 'due process of law,' though neither the city nor state laws require such notice, its enforcement will be enjoined."

In the case of *Security Trust Co.* v. *City of Lexington*, 203 U. S. 323, it was held that there was due process of law in assessing omitted taxable property, although the assessment was made without notice, where the state court

gave the property owner an opportunity to be heard on both the question of the validity and the amount of the tax. The court said:

"If the statute did not provide for a notice in any form, it is not material that, as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute. *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. Before the special assessment could be actually enforced or during the process of enforcement the taxpayer must have an opportunity to be heard as to its validity and extent. In *Weyerhaeuser* v. *Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485, it was held that the taxpayer was entitled to an opportunity to be heard before the tax could be enforced (see page 556, L. ed. page 586, Sup. Ct. Rep. page 488), that the filing of the tax list therein spoken of was, in effect, as held by the court, the institution of an action against each tract of land described in it, and the taxpayer thereafter had opportunity to make any defense he might have. This the court held was sufficient. The proceedings leading up to that assessment originated in a complaint, in writing, to the governor, who thereupon appointed a commission to hear the matter and, if proper, impose the tax, but before it could be enforced or during the process of collection the landowner had a right to be heard. The statute now before us does not provide for a notice of the special assessment, nor did the plaintiff have an opportunity to be heard as to the assessment before the board of equalization.

"But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and, after such opportunity, has rendered a judgment which provides for the enforcement of the tax as it has been reduced by the court, the reduction amounting to over $5,000. The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to

be given? Whether the opportunity to be heard which has been afforded to the plaintiff has been pursuant to the provisions of some statute, as in *McMillen* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335, and *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material. The state court in this case has held the taxpayer entitled to a hearing, and has granted and enforced such right, and upon the trial the tax has been reduced. In so doing the court below has not assumed the legislative function of making an assessment. It has merely reduced, after a full hearing, the amount of an assessment made by the assessor under color, at least, of legislative authority."

Applying the principles laid down in the case from which we have just quoted, it clearly appears, we think, that there was no opportunity to be heard. At no place in the proceedings was the plaintiff in error afforded an opportunity to contest the amount of the assessment against it.

IV.

The Indiana Statute is Unconstitutional for the Reason That it Does Not Afford the Back-Lying Property Owner the Equal Protection of the Laws.

If any assessment was proper against the plaintiff in error or its property, that assessment should have been made in the same manner as the assessments made against the abutting property owner. It would be a denial of the equal protection of the laws to so construe the statute that a specific assessment should be made against the abutting property owner and an opportunity to be heard given him, and that as to the back-lying property owner the assess-

ment should be determined years afterward by a method of subtraction and opportunity to be heard denied altogether. The equal protection of the laws is certainly denied in such a case. The abutting owner has assessed against him a specific assessment and is given an opportunity to challenge the amount of that assessment. The back-lying property owner has an assessment made against him years afterward and is given no opportunity whatever to challenge it. This all occurs in a single proceeding—on the same improvement. To give one property owner the right to be heard and to deny it to another, both of whom contribute to the same improvement, is certainly a denial of the equal protection of the laws. To impose upon one the obligation to pay only after an opportunity to be heard, and to impose upon another the obligation to pay without any opportunity to be heard, is certainly a denial of the equal protection of the laws.

The question of what is a denial of the equal protection of the laws has been considered in a great many cases, and we think the principle may be deduced from the decisions that any law which denies privileges to or imposes burdens upon a particular class of persons, which are not denied to or imposed upon other persons similarly situated amounts to a denial of the equal protection of the laws.

In the recent case of *Ex parte Drayton*, 153 Fed. Rep. 986, a statute of the state of South Carolina which imposed penalties upon agricultural laborers only was held invalid as a violation of the equality clause of the fourteenth amendment of the federal constitution.

In the case of *Gulf, etc., R. Co.* v. *Ellis*, 165 U. S. 150, it was held that:

"A state statute imposing an attorney's fee not to exceed $10 in addition to costs, upon railway corporations omitting to pay certain claims within a certain time after

presentation, which applies to no other corporations or individuals, is unconstitutional as denying to them the equal protection of the laws."

In the case of *Beebe* v. *Magoun* (Iowa), 97 N. W. Rep. 986, it was held, under a statute in reference to drainage assessments, that the federal constitution was violated by providing that abutting owners should have notice of their assessments, while no notice was provided for owners whose property did not abut on the drain.

The case of *Yick Wo* v. *Hopkins,* 118 U. S. 356, is a leading case on this subject. In that case the court said:

"In the present cases we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." * * *

"The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite deemed by

the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion can not be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the fourteenth amendment of the constitution."

In the recent case of *Raymond* v. *Chicago, etc., Co.*, 207 U. S. 541, this court held that an assessment of the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which results in enormous disparity and discrimination, amounts to a denial of the equal protection of the laws guaranteed by the federal constitution.

So here we think it clear that the plaintiff in error was denied the equal protection of the laws when it was denied the opportunity of having its assessment specifically fixed in advance and then given an opportunity to be heard on that assessment as was given the abutting property owners on the street improved.

Conclusion.

It seems clear to us that not only was the plaintiff denied due process of law, but also the equal protection of the laws in the assessment and judgment against it, and that the judgment of the Indiana appellate court should be reversed.

Respectfully submitted,

Leonard J. Hackney,

Frank L. Littleton,

For Plaintiff in Error.

APPENDIX A.

"Barrett Law."

Burns' R. S. 1894, sections 4288-4294.

4288. (E. S. 812.) Petitions for Street Improvements—Procedure.—1. That when the owners of two-thirds of the whole line of lots or parts of lots in any city or incorporated town (and measuring only the front line of such lots as belong to such persons resident in such city or town) bordering on any street or alley consisting of one whole square between any two streets crossing the same, if the common council of such city, or the board of trustees of such town, deem it expedient for any reasonable distance less than one whole square or block upon any square or alley, shall petition the common council of such city or board of trustees of such town to have the sidewalk graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for lighting such streets according to the general plan of improvements in said city or incorporated town, or for constructing a sewer, the common council of such city or the board of trustees of such town may cause the same to be done by contract, given to the best bidder, after advertising for three weeks in some newspaper of general circulation published within the city or incorporated town, to receive proposals therefor, and the common council of such city, or the board of trustees of such town shall have the power to compel the owner or owners of a lot or part of a lot on any street or alley, or upon any part of any street or alley, to repair the sidewalk in front

of their respective lots or parts of lots, and in case the owner or owners of any lot or part of a lot on any street or alley, or any part thereof, fail or refuse to repair the sidewalk in front of their lots, or if the owner be a non-resident of said city or town, or can not be found, the common council of such city or the board of trustees of such town may cause such repairs to be made at the cost and expense of the owner or owners of such lot or lots; or if such sidewalk be dangerous, the street commissioner or any officer of said city or incorporated town may cause such repairs to be made immediately, and the city or incorporated town shall have a lien on such lot or lots for the reimbursement to her of the cost of such improvement, and the common council of such city or the board of trustees of such town are hereby invested with full powers to pass by-laws and ordinances providing how and in what manner the repairs or improvements shall be made and in what manner the cost shall be assessed and collected from such owner or owners, and the manner in which the lien of the city or incorporated town for the expense incurred by her may be enforced against the lot or lots of such owner or owners, and the city or incorporated town may bring an action, by its attorney, in any court of competent jurisdiction to foreclose such lien as a mortgage is foreclosed, and in such action shall recover, in addition to the amount of such lien and the costs of such proceedings, a reasonable attorney fee, for the use of its attorney, for enforcing such lien, and such property shall be sold without relief from valuation or appraisement laws, and, upon the sale of such property, if no other person bid, the amount of such judgment and all costs, the city or incorporated town may purchase said property for such judgment and all costs, and if not redeemed within one year from the time of such sale the sheriff shall issue to the holder of the certificate of sale a

deed for such property, and such city or incorporated town having a population less than ten thousand may, by a two-thirds vote of all the members of the common council of such city or the board of trustees of such town, cause plank or gravel walks, of such dimensions as such council or such board of trustees may determine, to be constructed either upon the natural grade of the sidewalk therein or any modification thereof established by such council or such board of trustees, and the cost and expense of any such improvement or repairs thereto shall be a lien upon the real estate fronting thereon, and shall be assessed and collected in the same manner as now prescribed by law for collecting assessments for improving streets, alleys and sidewalks: Provided, further, That when the state of Indiana is the owner of property on or along the street or streets proposed to be improved, as hereinbefore provided, the common council of such city or the board of trustees of such town shall not contract for the execution of said improvements, involving the state in any liability, without first obtaining the written consent and approval of the auditor and treasurer of state, but such city or incorporated town may make such improvement at its own expense.

4289. (E. S. 813.) RESOLUTION OF NECESSITY—NOTICE TO OBJECTORS.—2. Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some

such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof.

4290. (E. S. 814.) APPORTIONMENT OF COSTS—LIENS—SALE.—3. In all contracts specified in the preceding section the cost of any street or alley, or the part thereof to be improved per running foot (and the costs of any such sewer shall be apportioned among the lands, lots and parts of lots benefited thereby, and according to such benefits, without regard to the assessment for taxation of such property), and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved (or of the lots or parts of lots benefited by the construction of such sewer), shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements (and for the construction of such sewer for the benefit of such lots or parts of lots thereby), and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided, and in all cases where such improvement shall have been made, or may hereafter be made on any street or alley running along or through any unplatted lands lying within the corporate limits of such city or incorporated town, the cost of such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street

or alley or the part thereof to be improved shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and, in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands, shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement: Provided, however, That where such land is subdivided or platted the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order. Such assessments, with the interest accruing thereon, shall be a lien upon the property so assessed and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting taxes, and shall not be divested by a judicial sale, and if such city or incorporated town shall fail, neglect or refuse to promptly enforce and collect such assessment when due, the owner or holder of any of the bonds or certificates hereinafter mentioned may foreclose such lien or liens as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover, in addition to the amount of said bonds and interest and all costs, a reasonable attorney's fee. The amount realized by the sale of any such property, or the payment of such assessment after the payment of the costs of such proceeding shall, to the extent of such assessment, with interest thereon, be applied pro rata to the payment of the then outstanding bonds or certificates

herein mentioned, without reference to the time of the maturity of the bonds or certificates. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund.

4291. (E. S. 815.) ALLOWANCE TO OWNER WHO HAS IMPROVED—BONDS.—4. Whenever the owner of any lot or part of a lot, before the letting of such contract, shall have made any improvement in front of his lot or part of a lot, in accordance with the general plan for the improvement of such street or alley, and under the direction of the city or town engineer, he shall be entitled to a reasonable allowance therefor upon his proportion of the cost of such improvement, which reasonable allowance shall be determined by said engineer: Provided, That the common council of such city, or board of trustees of such incorporated town, may require all contractors for street and sewer improvements to give bonds, with good and sufficient freehold surety, for the faithful performance of the work, and that all contracts made by any city or incorporated town, or by any officer under the authority thereof, for public improvements or otherwise, in the profits whereof any officer shall be interested, directly or indirectly, shall be void: And, provided further, That after receiving bids for the improvement of any street or alley, or the construction of any sewer, as aforesaid, and in case all such bids are rejected as unsatisfactory by reason of the bids being for too great a price, or the bidder failing to give a satisfactory bond, or for any other cause deemed sufficient by such common council or board of trustees, then, and in such case, the common council of

any city, or the board of trustees of any incorporated town, may order the work to be done by the street commissioner of such city or the marshal of such town; but in such case the total cost of the work to be assessed against the property owners shall not be in excess of the lowest responsible bid for said work, which cost shall be assessed and collected, and bonds may be issued therefor, as provided in case of the letting of the work by contract, or the council or board of trustees may in such case readvertise for bids for said work.

4292. (E. S. 816.) ESTIMATES—HOW PAID—LIENS. —5. When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfillment, the common council of such city or the board of trustees of such town shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amount of percentage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preference over other demands, and such liens shall be in favor of the city or incorporated town, and the owner of the certificate or bonds hereinafter mentioned to secure to the city or incorporated town and such owners the reimbursement for such cost of improvement hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kinds of street and alleys to be made in like manner, without such petition, and either charge and cause any or

all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town.

4293. (E. S. 817.) FINAL ESTIMATE OF COSTS—REPORT OF ENGINEER.—6. When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching said improvement: First. The total cost of said improvement. Second. The average cost per running front foot of the whole length of that part of the street or alley so improved. Third. The name of each property owner on that part of the street or alley so improved. Fourth. The number of front feet owned by the respective property owners on that part of said street so improved. Fifth. The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. Sixth. The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer

according to the benefits conferred thereby, that should be assessed against such lot or part of a lot.

4294. (E. S. 818.) NOTICE OF HEARING—ASSESSMENTS—LIENS.—7. Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city, or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement, which said amounts shall bear interest at the rate of six per cent. per annum from the time of the finding of the completion of said improvement by the common council or board of trustees, as mentioned in section 6 of this act. Should any one of such assessments exceed the sum of fifty dollars, then if the owner of the lot or parcel against which said assessment is made, may, if he, within two weeks after the making of such assessments, shall prom-

ise and agree, in writing, to be filed with the clerk of such city or town, and to be spread of record by him in consideration of the right to pay his or their assessment, or respective assessments in installments, that they will not make any objections to illegality or irregularity as to their respective assessments, and will pay the same, with interest thereon, at the rate of not exceeding six per centum per annum, as shall by ordinance or resolution of the common council of such city, or board of trustees of such town, be prescribed and required, he or they shall have the benefit of paying said assessments in ten annual installments, as hereinafter provided. Any owner of any lot who has been assessed more than the sum of fifty dollars thereon for the cost of such improvement who will not promise and agree in writing as herein provided, and all other owners of lots or parcels wherein assessments less than fifty dollars have been made or have heretofore been made against any one lot or parcel, shall be required to pay his or their assessment in full when made, and the same may be collected according to the provisions of amended section 10 of this act, or the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover, in addition to the amount of such assessment, with interest, all costs and a reasonable attorney's fee. Whenever any payment shall be made upon any of such assessments, it shall be the duty of the treasurer, contractor or owner of the assessments, bonds or certificates or installments of assessments, as hereinafter provided, receiving such payment, to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment, and upon the payment of any bonds or certificates as are issued under this act they shall be surrendered to and canceled by the treasurer; when bonds have

been requested as aforesaid, then the common council of such city or board of trustees of such town shall cause the said assessment amounting to more than fifty dollars and bonds requested therefor to be placed upon the city or incorporated town tax duplicate and charged against the several lots or parcels of grounds as follows: Ten per cent. for each successive year for ten years, to which several amounts shall be added and placed on the duplicate, interest at six per cent. per annum, payable semi-annually, which shall be calculated from the time of the acceptance of the work by the common council or board of trustees, until the several allowances fall due; and the first ten per cent. shall be due and payable when the first tax falls due, and is payable after such assessment is made; and said assessment, as made, together with the interest thereon, shall be a lien upon the several lots or parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collectible, or in such manner as the common council or boards of trustees, by ordinance, shall prescribe; and the law governing the collection of taxes shall, so far as the same is applicable, regulate and govern the collection of such assessment, and such assessment, and the proceeds arising therefrom shall constitute a special fund for the payment of the costs of such street, alley and sewer improvement, and the bonds and certificates hereinafter mentioned and for no other purpose.

APPENDIX B.

Opinion in Voris v. Pittsburg Plate Glass Co., 163 Ind. 599.

(Syllabus omitted.)

Monks, J.—Appellant brought this suit against the Pittsburg Plate Glass Company, the owner of back-lying real estate within 150 feet of a street in the city of Kokomo, improved in 1893, under the Barrett law, to enforce the lien of an assessment for said street improvement, on the ground that the subdivision primarily liable therefor had, at a judicial sale on a decree foreclosing said lien, proved insufficient to pay said assessment. A demurrer for want of facts was sustained to said complaint, and, appellant refusing to plead further, judgment was rendered against him. It appears from the complaint, among other things, that Joseph S. Amos was the owner of lots twenty and twenty-one, lying immediately upon and adjacent to the line of said street improvement, neither of which extended back 150 feet from the front line thereof; that appellee Pittsburg Plate Glass Company owned all the real estate lying back of each of said lots within said 150 feet. The city engineer, as required by section 4293, Burns 1894 (Acts 1889, p. 237, section 6), described in his report said lots twenty and twenty-one, and gave the name of Jacob S. Amos as the owner thereof. In said report the amount of the cost of the improvement due upon said lot twenty was $200.60, and upon said lot twenty-one was $212.50, which amounts were ascertained by the frontage of said lots, as provided

in the fifth clause of section 4293, *supra*, but said backlying real estate of appellee Pittsburg Plate Glass Company was not described in said report. After giving the notice required by section 4294, Burns 1894, being section seven of the act of 1889, *supra*, as amended by the act of 1891 (Acts 1891, pp. 324-326), "no objection being made to said engineer's report, the common council of said city adopted the same and the assessments without alteration or amendment."

The owners of the lots described in said report of the engineer signed and filed a written promise to pay said assessments as provided in section 4294, *supra*, and the city issued and sold street improvement bonds to pay for the improvement of said street, under section 4296, Burns 1894 (Acts 1889, p. 237, section 8). Appellant is the owner of all the bonds and the interest coupons attached thereto so issued by said city of Kokomo, and the same, to the amount of several thousand dollars, are due and unpaid. In a suit in the court below, brought by appellant for that purpose, he recovered a personal judgment against said Amos on said written promise, and a decree foreclosing said assessment lien against said lots twenty and twenty-one. Said lots were duly sold upon said decree, and the proceeds of said sale were not sufficient to pay the same. Said Amos was insolvent, and since the rendition of said judgment has been adjudged a bankrupt in the district court of the United States for the district of Indiana. Under section 4296, *supra*, appellant, as the owner of bonds, has all the rights and interest of said city of Kokomo in and to the assessments and liens for the improvement of said street, with full power to enforce the collection thereof by foreclosure.

It is provided in section 4290, Burns 1894 (Acts 1889, p. 237, section 3), that "the owners of lots or parts of lots bordering on such street or alley, or the part thereof to

be improved, * * * shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements, * * * and in making the assessments against such owners for the improvement of such lots or parts of lots and unplatted lands shall be assessed upon the ground fronting immediately abutting on such improvement back to the distance of 150 feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement: Provided, however, That where such land is subdivided or platted the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said 150 feet shall be liable in their order."

The word "of" between the words "improvement" and "such" in the part of said section above set out is incapable of any sensible meaning, and the clause in which it appears is complete and sensible without it. It is evident that said word was inserted through inadvertence or mistake, and should be rejected. Black, Interp. of Laws, section 39; Sutherland, Stat. Constr., section 260, p. 342; Endlich, Interp. of Stat., sections 301, 302.

Construing the above-quoted provisions of section 4290, *supra*, in connection with sections 4293, 4294, *supra*, it is evident that the common council of the city or the board of trustees of the town assess the special benefits of the improvement to each lot or parcel of ground abutting thereon, to such lot or parcel of ground, regardless of whether the same extends back 150 feet or less from the front line thereof. *Adams* v. *City of Shelbyville* (1900), 154 Ind. 467, 491, 49 L. R. A. 797, 77 Am.

St. 484. The city or town engineer in his report under section six of said act of 1889 (Acts 1889, p. 237, section 4293, *supra*), only gives the description of the lots and parcels of ground bordering on the street or alley improved, and the names of the owners thereof, and the amount of the cost for the improvement due from such lots or parcels of ground determined by the frontage, regardless of whether the same extend back 150 feet or less from the front line thereof. *City of Terre Haute* v. *Mack* (1894), 139 Ind. 99, 105-110. When, therefore, the common council of the city or board of trustees of the town have made the assessments to each of said abutting lots or parcels of ground so as to conform to the special benefits accruing to each of said abutting lots or parcels of ground, as provided in section 4294, Burns 1894, whether by adopting said report of the engineer as made, or after altering or amending the same, such assessments, by the express provision of section 4290, *supra*, are a lien, not only on the lots or parcels of ground bordering on said street or alley, but on the back-lying lots or parcels of ground, if any, within 150 feet of the front line thereof. While the subdivision or parcel of ground "lying immediately upon and adjacent to the line of improvement" must be first exhausted before the second parcel, and the others in their order, can be sold to pay the assessment, the same is a lien not only on said first subdivision or parcel, but on all the subdivisions or parcels lying back thereof within said 150 feet from the front line, to the extent provided in section 4290, *supra*, although owned by different persons, and who were not named in the report of the engineer or in the assessment made by the common council of the city or board of trustees of the town. *Town of Woodruff Place* v. *Raschig* (1897), 147 Ind. 517, 523, 524.

The notice by publication required by section 4294,

supra, when made, gives the common council of the city or board of trustees of the town full and complete jurisdiction over the person of each person owning land within the taxing district of said improvement, whether the same abuts on the improvement or not. Said notice having been given, said owners of back-lying real estate, like the owners of real estate abutting on said improvement, are bound to know the law, and that their real estate is in the taxing district of said improvement, and will be subject to the lien of special benefits assessed in the manner and to the extent above stated. *Hyland* v. *Brazil Block Coal Co.* (1890), 128 Ind. 335, 340, 341. All of said owners of real estate within said taxing district, whether back-lying or abutting, have the right to appear before the committee or common council of the city or board of trustees of the town and be heard on the engineer's report, and object thereto, and have a hearing on the question of special benefits, which the law requires said common council or board of trustees to adjust so as to conform to the special benefits accruing to said abutting real estate. *Adams* v. *City of Shelbyville* (1900), 154 Ind. 467, 484-491, 49 L. R. A. 797, 77 Am. St. 484; *Leeds* v. *Defrees* (1901), 157 Ind. 392, 397; *Hibben* v. *Smith* (1902), 158 Ind. 206, 208-211. It is true that only the special benefits to the abutting lots or parcels of ground are assessed by the common council of the city or board of trustees of the town; but if any such lot or parcel of ground does not extend back 150 feet from the front line thereof, and within said 150 feet, has such an interest in the assessment to such abutting lot or parcel of ground as entitles him to a hearing on the question of actual special benefits thereto, because his real estate is subject to the lien of said assessment, when made, to the extent provided in section 4290, *supra,* and is liable to be sold to pay the same in the order prescribed in said sec-

tion. It follows that when the common council assessed the special benefits of said improvement to lot twenty at $200.50 and to lot twenty-one at $212.60, the same was not only an assessment against said lots, but, *ex proprio vigore*, was a valid assessment and a lien against all the real estate lying back of each of said lots respectively, and within 150 feet of the front line thereof, to the extent provided in the proviso of section 4290, *supra*, and was binding alike on the owner of said lots twenty and twenty-one and said Pittsburg Plate Glass Company, appellee, the owner of the back-lying real estate.

It is insisted that this construction of the Barrett law renders the same unconstitutional as to the back-lying real estate, on the ground that each owner of real estate, whether the same is abutting or back-lying, is entitled to a hearing on the question of the special benefits to his parcel of land; citing *Adams v. City of Shelbyville, supra; Martin* v. *Wills* (1901), 157 Ind. 153; *Leeds* v. *Defrees, supra; Wray* v. *Frey* (1902), 158 Ind. 92. The only question before the court in the cases cited was the proper construction of the Barrett law, and this court held in those cases that said law provided that the real estate within the taxing district, *prima facie*, received special benefits from the improvement according to frontage, but that the common council of the city or board of trustees of the town had the power to alter or change the same so as to conform to the special benefits received, and that all persons aggrieved had the right to a hearing before such questions were determined. It was held that the law so construed was not obnoxious to any provision of the state or federal constitution. It was not necessary, therefore, in said cases to determine as to the constitutionality of a law which declared that the total cost of an improvement should be assessed equally against the frontage according to what is known as the front-foot rule, without allowing

or providing for a hearing as to special benefits to the real estate charged therewith, for no such law was before the court. None of said cases cited by appellee gives any support to its contention. What was said in *Adams* v. *City of Shelbyville, supra,* concerning a law which makes no provision for a hearing on the question of special benefits, and that such a law would be in violation of the fourteenth amendment to the constitution of the United States, under the case of *Norwood* v. *Baker* (1898), 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, was clearly *obiter dicta,* for the reason, as we have shown, that no such question was before the court for decision. *Adams* v. *City of Shelbyville, supra,* did not overrule any of the following cases decided by his court: *Ray* v. *City of Jeffersonville* (1883), 90 Ind. 567; *City of Indianapolis* v. *Imberry* (1861), 17 Ind. 175; *Flournoy* v. *City of Jeffersonville* (1861), 17 Ind. 169, 79 Am. Dec. 468; *Palmer* v. *Stumph* (1868), 29 Ind. 329; *City of New Albany* v. *Cook* (1867), 29 Ind. 220; *Snyder* v. *President, etc.* (1855), 6 Ind. 237; *Ross* v. *Stackhouse* (1887), 114 Ind. 200; *Garvin* v. *Daussman* (1887), 114 Ind. 429, 5 Am. St. 637; *Johnson* v. *Lewis* (1888), 115 Ind. 490; *Weaver* v. *Templin* (1887), 113 Ind. 298; *Goodrich* v. *Winchester, etc., Turnpike Co.* (1866), 26 Ind. 119; *Law* v. *Madison, etc., Turnpike Co.* (1868), 30 Ind. 77; *Gilson v. Board, etc.* (1890), 128 Ind. 65, 11 L. R. A. 836; *Board, etc.,* v. *Harrell* (1897), 147 Ind. 500, 504-507.

In *Webster* v. *Fargo* (1901), 181 U. S. 394, 21 Sup. Cy. 623, 45 L. Ed. 912 (and see *French* v. *Barber Asphalt Pav. Co.* (1901), 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Detroit* v. *Parker* (1901), 181 U. S. 399, 21 Sup. Ct. 624, 45 L. Ed. 917; *Cass Farm Co.* v. *Detroit* (1901), 181 U. S. 396, 21 Sup. Ct. 644, 45 L. Ed. 914; *Shumate* v. *Heman* (1901), 181 U. S. 402, 21 Sup. Ct.

645, 45 L. Ed. 922; *Farrell* v. *West Chicago Park Com.* (1901), 181 U. S. 404, 21 Sup. Ct. 609, 45 L. Ed. 916; *Tonawanda* v. *Lyon* (1901), 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. 908), cited in *Martin* v. *Wills* (1901), 157 Ind. 153, 155, the supreme court of the United States held "that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of said court to hold otherwise in *Norwood* v. *Baker* (1898), 172 U. S. 269," and that a state law apportioning the entire cost of a street or alley improvement upon the abutting lots according to their frontage, without any hearing as to the benefits, was not in violation of the fourteenth amendment to the constitution of the United States; that the legislature in enacting such laws exercises not the right of eminent domain, but that of taxation (Cooley, Taxation (3d ed.), 1181-1183) and may, in the exercise of its discretion, direct the cost of the improvement to be charged to the land within the taxing district "in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated" by some body or person designated. See, also, Elliott, Roads and Sts. (2d ed.), sections 558, 560, 564, and cases cited; Dillon, Mun. Corp. 4th ed.), section 752; 2 Cooley, Taxation (3d ed.), 1180-1183, 1202-1208, 1217-1222, 1226, 1227; *Cass Farm Co.* v. *City of Detroit* (1900), 124 Mich. 433, 83 N. W. 108, and cases cited; *Farrell* v. *West Chicago Park Com.* (1899), 182 Ill. 250, 55 N. E. 325; *Farrer* v. *City of St. Louis* (1883), 80 Mo. 379; *Barber Asphalt Pav., etc., Co.* v. *French* (1900), 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492, and cases cited; *Webster* v. *City of Fargo* (1900), 9 N. Dak. 208, 82 N. W. 732, 56 L.

R. A. 156, and cases cited; *Williams* v. *Eggleston* (1898), 170 U. S. 304, 311, 18 Sup. Ct. 617, 42 L. Ed. 1047; *Parsons* v. *District of Columbia* (1898), 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943; *Bauman* v. *Ross* (1897), 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *Davidson* v. *New Orleans* (1877), 96 U. S. 97, 104, 24 L. Ed. 616; *County of Mobile* v. *Kimball* (1880), 102 U. S. 691, 26 L. Ed. 238; *Hager* v. *Reclamation District* (1884), 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Wurts* v. *Hoagland* (1885), 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; *Walston* v. *Nevin* (1888), 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; *Spencer* v. *Merchant* (1888), 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763.

It is insisted by appellee that the bondholder succeeds only to the lien against the property owned by those who sign the waiver and promise to pay the assessment, and that as the Pittsburg Plate Glass Company did not sign such writing, appellant, the bondholder, has no lien on the back-lying real estate owned by it. Even if no bonds should have been issued by the common council of said city to procure the money to pay the assessments against said lots twenty and twenty-one, and the real estate owned by the plate glass company, until said company signed said waiver and promise—a question we need not and do not decide—still the execution of said writing by the owner of said lots twenty and twenty-one did not release the back-lying real estate of the plate glass company from the lien of said assessment. The bonds having been issued, and the money paid therefor by the bondholder used to pay the contractor, the bondholder is subrogated to the rights of the city and contractor to enforce the lien of said assessment against said lots twenty and twenty-one, and the real estate lying back thereof, to reimburse him for the money so used. Appellant was not

a mere volunteer, but upon principles of equity and justice is entitled to enforce the lien of said assessments. *Davis* v. *Schlemmer* (1897), 150 Ind. 472, 478, and cases cited; *Fowler* v. *Maus* (1894), 141 Ind. 47, 52, 54, and cases cited; *Reed* v. *Kalfsbeck* (1897), 147 Ind. 148, 154, 155, and cases cited; *Milburn* v. *Phillips* (1895), 143 Ind. 93; *Baker* v. *Edwards* (1901), 156 Ind. 53, 58, and cases cited; *Watkins* v. *Winings* (1885), 102 Ind. 330, 331; *Bodkin* v. *Merit* (1885), 102 Ind. 293, 296.

It follows that the court erred in sustaining the demurrer to the complaint. Judgment reversed, with instruction to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Hadley, J., dissents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 213.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Plaintiff in Error,

vs.

Robert L. Porter, Melvin L. Bowlin and Chester G. Hadley, Partners, Doing Business Under the Firm Name and Style of "Porter, Bowlin and Hadley," Defendants in Error.

In Error to Division Number Two of the Appellate Court of the State of Indiana.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

GEORGE H. GIFFORD, and
GLEN J. GIFFORD,
For Defendants in Error.

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BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This writ is prosecuted by the plaintiff in error to review a judgment of Division Number Two of the Appellate Court of Indiana, which judgment is in favor of the defendants in error and is enforcing the lien for street improvement against the property of Thomas Kersey, Robert Kersey and Lillian Kersey, and the property of the plaintiff in error.

The action was originally begun by the defendants in error against the plaintiff in error in the cir-

cuit court of the county of Boone, State of Indiana. An amended complaint was filed in that court consisting of two paragraphs, each based upon separate assessments. Each paragraph alleged each several step necessary under the statute of the State of Indiana for the improvement of the street and the creation of the lien on the property within the taxing district for such improvement. The amendment to the complaint consisted in the making of Robert H. Kersey and Lillian Kersey, his wife, party defendants to each paragraph. (Printed Record, pp. 4-12.) The venue of said suit was then changed to the Marion Circuit Court.

The plaintiff in error demurred to each paragraph of complaint. (Printed Record, pp. 14-15.) These demurrers were overruled. (Printed Record, pp. 15.)

The plaintiff in error filed answers in nine paragraphs. The first paragraph of answer was a general denial. The second paragraph of answer in substance was that that lands described in the complaint did not abut upon the street improved, but that they laid back of lands owned by other parties on said street. That in the proceedings of the common council in the city of Lebanon, in any action taken by the civil engineer of said city, in any notice to property owners, in any assessment of property had, given or done with reference to said improvement, this defendant's lands were not named, described nor referred to, nor was either of them; that neither of said tracts were assessed for said improvement, neither of said tracts were considered with reference to any assessment for said improvement, neither of said tracts was benefited by said improvement; that the defendant did not appear before said council or any committee of said council, either actually or constructively, with reference to either

of said tracts, and the records of the proceedings of the city of Lebanon as to said improvement do not disclose any such occurrence by or notice to this defendant for the consideration or assessment of either of said tracts for such improvement. (Printed Record, pp. 15-16.)

The third paragraph was as follows: For a third and further answer to the complaint the defendant says, that the acts of the General Assembly of the State of Indiana under and by virtue of which it is claimed and assumed that the liens respectively sued upon and approved and attached to the respective tracts of the defendant is unconstitutional and void in that it makes no provision for a notice to or a hearing from the property owners whose property does not abut upon the street to be improved; it denies due process of law, denies the equal protection of the law and takes private property for public use without compensation. (Printed Record, p. 16.)

The proposition presented by the remaining answers filed are not sought to be reviewed before this court hence, we omit them.

A demurrer was filed for want of facts to the third paragraph of answer, which demurrer was sustained and to the ruling the plaintiff in error excepted. (Printed Record, p. 21.)

The issues were closed by a reply and general denial. (Printed Record, p. 21.)

The cause was tried by the court and a special finding of facts was made, and conclusions of law stated thereon. (Printed Record, p. 23, Et seq.)

Special finding of facts shows the adoption of the declaratory resolution for the improvement of West Main street in the city of Lebanon, Indiana; the giving by publication of general notice to all persons interested that they could appear at a stated time and object to said improvement. The objec-

tions were heard to said improvement and said improvement was ordered and plans and specifications for the same adopted. That after advertising for bids the contract was let to the defendants in error, who did the work, and which was accepted after completion. That an estimate of the cost and expenses of said improvement was made against the parcels of land abutting upon the improved street. The assessments appear in Printed Record, p. 66.

A general notice was given by publication to all persons interested or aggrieved, of the hearing on said estimate, and for them to appear and make objections, if any, to said final estimate report. (Printed Record, p. 25.)

That such hearing was had and such report corrected, adopted and approved. The court further found that Mary Kelley owned lands abutting on said street which was assessed $588.56, and that Thomas A. Kersey owned lands lying immediately back of said lands owned by Mary Kelley, describing them, and that the plaintiff in error owned the lands lying immediately back of the said lands owned by the said Kersey and that all of them were within 150 feet of said improved street. The court further found that John T. Walton owned lands abutting on said street which were assessed $273.73 and that lying immediately back of the lands owned by said Walton were lands owned by said Robert H. Kersey and Lillian Kersey and that immediately back of said lands owned by said Kersey were the lands of the plaintiff in error and that all of said lands were within 150 feet of the said improved street.

The court further found that there was a foreclosure of the lien against the lands of Mary Kelley and a sale of said lands for $75.00, leaving a balance of $617.17 due with interest and attorneys' fees amounting to $836.70, and that there was a foreclos-

ure of said lien against the land of John T. Walton and the sale of the same for $12.00, leaving a balance of $314.80 due with interest and attorney fees, amounting to $406.09.

PROPOSITION RELIED UPON BY DEFENDANT IN ERROR.

The Statute Under Which the Assessments here in Controversy were made does not Violate any section of the Constitution of the United States.

BRIEF OF THE ARGUMENT.

Points and Authorities.

Proposition No. 1.

That the statute of the State of Indiana (Burn's R. S. 1894, sections 4288 to 4299 both inclusive) in pursuance to which the assessments herein were made is in harmony with section one (1) of the fourteenth (14th) amendment of the Constitution of the United States for the reason that said law furnished the plaintiff in error due process of law and equal protection of law guaranteed by said section one (1) of the Fourteenth Amendment to the Constitution of the United States.

Statutes of Indiana, Burn's Revision 1894, Section 4294. (E. S. 818.)

Shafer vs. Werling, 188 U. S. 516.

Fall Brook Irrigating Co., vs. Bradley, 164 U. S. 168.

Hibben vs. Smith, 191, U. S. 321.

Voris vs. Pittsburg, Etc., Co., 163 Ind. 599.

Proposition No. 2.

Assessments made for the contsruction of public improvements are in the nature of a tax and are subject to summary proceedures the same as State,

County and Municipal taxation and the law does not contemplate that there should be a decree or order of court to make such assessment valid, but it is sufficient if there is a tribunal or committee created by the statute to hear and determine the correctness of such assessment and a provision for due notice to the parties of such hearing, it is a full and complete compliance with the constitutional provision of section one (1) of the Fourteenth Amendment of the Constitution of the United States.

Cass Farm Co., vs. Detroit, 181 U. S. 396.
Detroit vs. Parker, 181 U. S. 399.
Webster vs. Fargo, 181 U. S. 394.
French vs. Barber Asphalt Co., 181 U. S. 324.

Proposition No. 3.

Where the Statute of a State has been construed by the highest court of the state, the Supreme Court of the United States will follow the construction given such statute by the said State court, and if the construction given it by the said state court is such as to bring it in harmony with and make its application in harmony with the Constitution of the United States, such statute will be upheld and sustained.

Hibbin vs. Smith, 191 U. S. 321.

Proposition No. 4.

In matters of taxation and assessment for local improvements where there is a taxing district established by the statute under which such proceedings are being prosecuted a notice to all interested without setting out the name of the party owning the real estate and without setting out the description of the property taxed is a sufficient notice.

Lent vs. Tilson, 72 Cal. 404.
Ottawa vs. Macy, 20 Ill. 412.
Voris vs. Pittsburgh, Etc., Co., 163 Ind. 599.

Proposition No. 5.

It is the province of the legislature to fix the notice to be given in matters of public improvements.

Hiland, Aud. vs. Brazil B. Co., 128 Ind. 340.
Ottawa vs. Macy, 20 Ill. 413.
Shaefer vs. Werling, 188 U. S. 516.

ARGUMENT.

Plaintiff in error say the questions presented in this case are simple and clean cut ,towit, that the statute under which these assessments were made denied the plaintiff in error due process of law and equal protection of law when the assessments were made against its property. To determine this question we must ascertain what provision the statute in controversy has with reference to notice to parties interested and with reference to hearing grievances. Section 4294, Burns' R. S. of 1894, being section 7 of the original act, the section with reference to notice and hearing grievances on account of assessments is as follows:

4294. (E. S. 818.) Notice of Hearing—Assessments—Liens.—7. Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city or the board of trustees of such

town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement, which said amounts shall bear interest at the rate of six per cent. per annum from the time of the finding of the completion of said improvement by the common council or board of trustees, as mentioned in section 6 of this act. Should any one of such assessments exceed the sum of fifty dollars, then if the owner of the lot or parcel against which said assessment is made, may, if he, within two weeks after the making of such assessments, shall promise and agree, in writing, to be filed with the clerk of such city or town, and to be spread on record by him in consideration of the right to pay his or their assessment, or respective assessments in installments, that they will not make any objections to illegality or irregularity as to their respective assessments, and will pay the same, with interest thereon, at the rate of not exceeding six per centum per annum, as shall by ordinance or resolution of the common council of such city, or board of trustees of such town, be prescribed and required, he or they shall have the benefit of paying said assessments in ten annual installments, as hereinafter provided. Any owner of any lot who has been assessed more than the sum of fifty dollars thereon for the cost of

such improvement who will not promise and agree in writing as herein provided, and all other owners of lots or parcels wherein assessments less than fifty dollars have been made or have heretofore been made against any one lot or parcel, shall be required to pay his or their assessment in full when made, and the same may be collected according to the provisions of amended section 10 of this act, or the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover, in addition to the amount of such assessment, with interest, all costs and a reasonable attorney's fee. Whenever any payment shall be made upon any of such assessments, it shall be the duty of the treasurer, contractor or owner of the assessments, bonds or certificates or installments of assessments, as hereinafter provided, receiving such payment, to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment, and upon the payment of any bonds or certificates as are issued under this act they shall be surrendered to and canceled by the treasurer; when bonds have been requested as aforesaid, then the common council of such city or board of trustees of such town shall cause the said assessment amounting to more than fifty dollars and bonds requested therefor to be placed upon the city or incorporated town tax duplicate and charged against the several lots or parcels of grounds as follows: Ten per cent. for each successive year for ten years, to which several amounts shall be added and placed on the duplicate, interest at six per cent. per annum, payable semi-annually, which shall be calculated from the time of the acceptance of the work by the common council or board of trustees, until the several allowances fall due; and the first ten per cent.

shall be due and payable when the first tax falls due, and is payable after such assessment is made; and said assessment, as made, together with the interest thereon, shall be a lien upon the several lots or parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collectible, or in such manner as the common council or boards of trustees, by ordinance, shall prescribe; and the law governing the collection of taxes shall, so far as the same is applicable, regulate and govern the collection of such assessment, and such assessment, and the proceeds asising therefrom shall constitute a special fund for the payment of the costs of such street, alley and sewer improvement, and the bonds and certificates hereinafter mentioned and for no other purpose.

This section, it is clear, is intended to give notice to all parties lying within the taxing district by publication, of the final hearing of benefits and liens, and of the time and place of such hearing. It also fixes the tribunal to hear such grievances. It has been decided in the case of Hibben vs. Smith, 191 U. S. 310, following Schaefer vs. Werling, 188 U. S. 516, that this provision for notice and for the tribunal and hearing is sufficient to satisfy section one of the fourteenth amendment of the constitution of the United States with reference to the front and abutting line of lots. That a notice, such as the one here in controversy, is sufficient, without mentioning the name of the owner or giving a description of the property in the notice.

Lent vs. Tilsen, 72 Cal. 404

Ottawa vs. Macy, 20 Ill. 412.

Voris vs. Pittsburg Plate Glass Co., 163 Ind. 599.

In Lent vs. Tilsen, supra, it is said: "The same accuracy and fullness of notice is not required in matters of taxation and local assessments as is re-

quired in courts of Justice—taxing board and city council are not courts of Justice.

"The authorities seem to be all, or, nearly all, in favor of the proposition that when the limits of the assessment district are defined in the statute, the notice need not be addressed to the person whose property is affected by name, nor was it necessary that the property sought to be taken or affected should be specifically described in the notice, as a whole the property is described in the statute."

In Ottowa vs. Macy, supra, it is said: "It is insisted that this form of notice "to all persons interested, as under it a person may be deprived of his property, is not sufficiently special and that the notice should contain either a description of the property or the name of the owner of the property assessed; that the notice is too general to affect the object intended by the notice. It is sufficient answer to this objection to say that it conforms to the requirements of the statute. It is general because the statute allows a general notice. The commissioners notified all persons interested that they had assessed a certain sum on the real estate in the part of the city benefited by graveling La Salle street from the south side of Main street to the canal bridge."

The notice contains a description of the property assessed, sufficiently to arrest the attention of the owners of lots, in that described locality.

Again, it is the province of the legislature to determine what notice in public improvements is necessary.

Klein vs. Tuhey, 13 Ind. App. 74.

Killian vs. Andrews ,130 Ind. 579.

Hyland, Aud., vs. The Brazil Block Coal Co., 128 Ind. 340.

Ottawa vs. Macy, 20 Ill. supra.

If this notice is sufficient for the abutting prop-

erty owners, why is it not sufficient for the owners of the back-lying lots? The owners of those lots must know the law, must know that their lots are within the taxing district and liable to assessment.

Voris vs. Pittsburg Plate Glass Co., supra.

Kitchen vs. St. Louis Railway Co., 69 Mo. 265.

Dunlap vs. Richardson, 181 Ga. 136.

Davidson vs. New Orleans, 96 U. S. 97.

10 Am. & English Encyclopedia, 300.

It is clear to us that this notice is reasonable and sufficient. That the tribunal before whom such grievances are to be determined is reasonable and sufficient, and the objection urged that the plaintiff in error had no notice is not sustained by the facts is as disclosed by the record. See printed record, page 64, where the following notice was given:

"Notice of Main Street Assessment.

Lebanon, Indiana, December 15, 1896.

Notice is hereby given that on the 4th day of January, 1897, at 10 o'clock a. m., in the council chamber in the city of Lebanon, Indiana, in the mayor's office in said city, before the committee on streets and alleys of the common council a hearing will be had on the final estimate as submitted by H. S. Bosler (consulting and constructing engineer for the common council of the city of Lebanon, Indiana) on the 14th day of December, 1896, of the cost of constructing brick roadways, curbs, and sidewalks on West Main street from the west side of Lebanon street to the west corporation line in the city of Lebanon, Indiana, pursuant to special ordinance for the improvement of said part of said street, and that at the same time and place a hearing will be had by said committee on the said engineer's final estimate report.

All persons interested or aggrieved are hereby notified of the time and place, when and where said

estimate will be considered, and this is your notice and you are hereby notified to appear and make objections, if any, to said final estimate report.

By order of the Common Council.

Attest: WILL A. TULL, City Clerk."

If this notice was sufficient in law, then the contention of plaintiff in error fails on that proposition. It is urged by the plaintiff in error and that there is no assessment fixed against its property at the date of this hearing. In a sense that is true, but the lien against its property was fixed at that date. The maximum amount for which its property was liable on each assessment was then adjusted and settled, and if it was in court and entitled to a hearing it seems to us that the important question to be determined would be the miximum amount of liability and not to determine the minimum amount.

Plaintiff in error insists that the owners of back-lying lots have the amount of their liability fixed years after by sale and credit of the front lot. In principal the same thing occurs in a court of equity in decreeing the sale of mortgaged property, where a part of property is primarily liable. The lein is declared and foreclosed in such case, and the amount to be paid by the property secondarily liable is fixed by what remains of the judgment after the property primarily liable has been exhausted by sheriff's sale. It, in such a case, could not be claimed that the party to such foreclosure proceedings had not an equal hearing with the party whose property was primarily liable.

It is well settled that this lien does attach to the back-lying lots and attach for the full amount of the assessment at the date of the final determination and hearing of the assessments by the board of trustees, or common council. That has been held by our Supreme Court in the case of Voris vs. Pittsburg

Plate Glass Co., supra, 163 Ind. 599., and also in the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., vs. The Edward C. Jones Co., 20 Ind. App. 87, and in the town of Woodruff vs. Roschig, 147 Ind. 517 on 523. In each of these cases the above proposition is especially decided, hence, the plaintiff in error was challenged at that time as to the amount of the lien for such improvement as should be placed upon its property.

It is well settled that the Supreme Court of the United States in determining the constitutionality of a statute will follow the construction of a statute given it by the highest court of a state where such statute has been enacted. In Hibben vs. Smith, 191 U. S. 321, the court quotes from Schaefer vs. Werling, 188 U. S. 516, as follows:

"The construction placed by the highest court of a state upon a statute providing for paving the streets and determining the assessments therefor was conclusive upon this court."

Taking that as a basis, the entire question, it seems to us, in this case, is put at rest by the construction given this statute by our own supreme court, in the case of Voris vs. The Pittsburg Plate Glass Co., supra. In that case this statute has been construed so as to entitle all back-lying lot owners to a hearing before the same committee on the same kind of a notice that front or abutting lot owners have and that they may there contest the question, possibly not of their assessment, but of the more important proposition, towit, the maximum amount of lien that will be placed upon the back-lying lots. If these rights are guaranteed to plaintiff in error and all other owners of back-lying lots by this statute, as thus construed, then it must be in harmony with section one of the fourteenth amendment of the constitution of the United States. It brings the

statute clearly within the following definition of what is due process of law and equal protection of law.

We quote from Fallbrook Irrigation District vs. Bradley, 164 U. S. 168: "Due process of law is not violated, and equal protection of law is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been continuously followed in the state, and where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one provided by the statute."

It seems clear to us that the plaintiff in error had due notice of the time and place when the lien would be placed upon its property. That it had an equal hearing with all other citizens before the same tribunal as to the amount of lien or liability that would be placed against its property and that it had provided by statute a competent tribunal to hear and determine that question, and for that reason there was due process of law and had an equal protection of the law.

Respectfully Submitted,
GEORGE H. GIFFORD, and
GLEN J. GIFFORD,
For Defendants in Error.